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Compensatory Contempt: Plaintiff's Remedy When Defendant Violates an Injunction

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COMPENSATORY CONTEMPT: PLAINTIFF'S REMEDY WHEN A DEFENDANT VIOLATES AN INJUNCTION

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I. INTRODUCTION

Contempt is the remedy imposed on a defendant for violating a judicially recognized right or obligation. A contempt order may be of three types: coercive, criminal, or compensatory. Courts employ coercive contempt to secure a plaintiff's substantive right. Coercive contempt is equity's equivalent of a writ of execution. When a defendant refuses to obey a personal order, the judge utilizes coercive tactics, including fines and imprisonment. Coercive contempt is prospective; it seeks to effect future obedience. In contrast, criminal and compensatory contempt are retrospective; they respond to past violations.[1] Judges use criminal and compensatory contempt when it is too late to coerce the defendant into the desired mode of conduct.

If a defendant willfully disobeys an injunction, a judge may impose criminal contempt in the form of a fine or imprisonment. The punishment expresses society's concern that people obey court orders. Coercive and criminal contempt judges wield the same tools. We distinguish criminal and coercive contempt by their goals. Coercive contempt is indeterminate; courts apply it until the defendant has complied with the court order. Criminal contempt, on the other hand, responds to harm the contemnor has already committed. To correct a public wrong, the authorities impose a fixed and determinate sanction.

Compensatory contempt is a money award for the plaintiff when the defendant has injured the plaintiff by violating an injunction. Compensatory and coercive contempt are both civil sanctions. We distinguish civil from criminal contempt on two grounds: civil contempt must conform to civil procedures and criminal contempt is administered within the framework of criminal procedures. Civil contempt benefits the plaintiff directly while criminal contempt is the state's

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1. Latrobe Steel Co. v. United Steelworkers, 545 F.2d 1336, 1344 (3d Cir. 1976).

method of punishing a recalcitrant without benefiting opposing litigants directly. Compensatory contempt resembles coercive and criminal contempt in that it requires the defendant to pay money damages. Unlike either coercive or criminal contempt, however, compensatory contempt transfers the money damages to the plaintiff. The contemnor, moreover, is never imprisoned.

Both criminal and compensatory contempt are retrospective; each form of contempt is designed to punish or remedy past harm, as distinguished from coercive contempt, which seeks to assure future compliance. Like tort and criminal laws, which also impose sanctions for past antisocial conduct, the differences between compensatory and criminal contempt grow out of both purpose and remedy. The general goals of criminal contempt are to punish and deter, as well as to vindicate the public interest in obedience to court orders. It may also benefit the plaintiff incidentally. In contrast, the goal of compensatory contempt is to indemnify the plaintiff directly for the harm the contemnor caused by breaching the injunction. Courts utilize compensatory contempt to restore the plaintiff as nearly as possible to his original position. The remedy is not penal, but rather remedial.[2] Courts measure compensatory contempt by evidence of reimbursable loss.[3] The terms "punishment" and "fine" fail to define a compensatory contempt award adequately.[4]

Courts apply the compensatory contempt remedy most often for violation of an injunction.[5] Like other remedies, compensatory contempt is designed to further the underlying substantive law.[6] Because different forms of substantive law underlie the various injunctions, application of compensatory contempt in the context of rigidly-defined

2. Leman v. Krentler-Arnold Hinge Last Co., 284 U.S. 448, 457 (1932).

3. National Drying Mach. Co. v. Ackoff, 245 F.2d 192, 193 (3d Cir. 1957) (Courts use the term "actual loss.").

4. *Cf.* Union Tool Co. v. Wilson, 259 U.S. 107, 112 (1922) ("punishment" means compensation); United States v. Montgomery, 155 F. Supp. 633, 637 (D. Mont. 1957) ("punishment" ambiguous); Holloway v. Peoples Water Co., 100 Kan. 414, 167 P. 265 (1917) (restitution is not a fine). *But see* 4 WEST'S FEDERAL FORMS 5653 (1970) (civil contempt form asks judge to punish contemnor).

5. For example, many leading compensatory contempt opinions grew out of injunctions protecting the statutory monopolies: copyrights and patents. Compensatory contempt also results from violations of injunctions protecting trade secrets, Glo-Klen Co. v. Far West Chem. Prods., Inc., 53 Wash. 2d 9, 330 P.2d 180 (1958); trademarks, Sweetarts v. Sunline, Inc., 299 F. Supp. 572 (E.D. Mo. 1972); and contracts not to compete, Coyne Indus. Laundry v. Gould, 359 Mass. 269, 268 N.E.2d 848 (1971); or that interdict rock concerts, Smith v. Indiana State Bd. of Health, 158 Ind. App. 445, 303 N.E.2d 50 (1973); and strikes, Long Island Ry. Co. v. Brotherhood of Ry. Trainmen, 298 F. Supp. 1347 (E.D.N.Y. 1969); or protecting an employee's right to minimum wages, Mitchell v. All States Bus. Prods. Corp., 232 F. Supp. 624 (E.D.N.Y. 1964), or nuisances, Department of Pub. Health v. Cumberland Cattle Co., 361 Mass. 817, 282 N.E.2d 895 (1972); or prohibiting improper disposal of furniture, Mathewson v. Primeau, 64 Wash. 2d 929, 395 P.2d 183 (1964); or protecting a party's right to a specially developed flower, Ramstead v. Hauge, 73 Wash. 2d 162, 437 P.2d 402 (1968).

6. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 1.2 (1973) [hereinafter cited at D. DOBBS].

rules may frustrate the substantive policies sought to be effectuated by the remedy. This article asserts that a pluralistic approach to compensatory contempt best reflects the courts' desire to promote the policies underlying the substantive laws, while avoiding the injustices that often result when a court adopts uniform rules of compensatory contempt.

Judicial application of compensatory contempt is often in the context of overlapping policies and consequences. Many antisocial acts possess parallel civil and criminal consequences. Courts of equity, for example, often enjoin crimes.[7] Civil consequences, moreover, may be both legal and equitable. Remedies may also be cumulative. A copyright infringer, for example, may be convicted, enjoined and charged with damages.[8] When a defendant violates an injunction, the plaintiff may choose between compensatory contempt and a separate action.[9] These procedures are so related that bringing either should be res judicata to preclude maintaining the other.[10]

The remedy of compensatory contempt should possess several characteristics. Compensatory contempt should conform to the substantive purpose expressed by the injunction and should never be more burdensome to a plaintiff than a separate damage action. Unless it is as procedurally smooth and financially remunerative as a separate damage action, compensatory contempt will fail to promote the underlying substantive purpose. It should advance the substantive purpose at least as effectively as a separate damage action. In addition to advancing the substantive standard, compensatory contempt should serve the decision to enjoin. Courts remedy most injuries with money damages. Because compensatory contempt is a satisfactory remedy only when an action for damages would be inadequate, this article will examine compensatory contempt by comparing the alternate remedy of retrospective money damages actions.[11]

Injunctions are issued in lieu of money damages when, for moral, economic, or administrative reasons, courts conclude that money damages are inadequate. The judge enjoins the defendant so that the plaintiff may enjoy the actual substantive interest rather than a money

7. Black, *The Expansion of Criminal Equity Under Prohibition*, 5 WIS. L. REV. 412 (1930).

8. 17 U.S.C. §§ 502, 504 (Supp. II 1978).

9. *In re* Barney's Boats of Chicago, Inc., 616 F.2d 164 (5th Cir. 1980); United States Steel Corp. v. United Mineworkers of America, Dist. 20, 598 F.2d 363 (5th Cir. 1979); Estate of Rothko, 84 Misc. 2d 830, 379 N.Y.S.2d 923, 963 (1975), *aff'd on other grounds*, 43 N.Y.2d 305, 401 N.Y.S.2d 449 (1975).

10. Campbell v. Motion Picture Mach. Operators, 151 Minn. 238, 186 N.W. 787 (1922); Estate of Rothko, 84 Misc. 2d 830, 379 N.Y.S.2d 923, 963 (1975), *aff'd on other grounds*, 43 N.Y.2d 305, 401 N.Y.S.2d 449 (1975); RESTATEMENT (SECOND) OF JUDGMENTS § 61(1) (Tent. Draft. No. 1 1973). Several contempt statutes provide that bringing compensatory contempt bars a separate damage action. MICH. COMP. LAWS ANN. § 600.1721 (1968); MINN. STAT. ANN. § 588.11 (West 1947); N.Y. JUD. LAW § 773 (McKinney 1975); N.D. CENT. CODE § 27-10-04(1) (1974); OR. REV. STAT. § 33.110 (1979); UTAH CODE ANN. § 78-32-11 (1953); WASH. REV. CODE ANN. § 7.20.100 (1961); WIS. STAT. ANN. § 295.14 (West 1958).

11. Parker v. United States, 153 F.2d 66, 71 (1st Cir. 1946).

substitute. When the defendant violates the injunction, however, the judge may order compensatory contempt.

The central irony of compensatory contempt is that the remedy confesses failure. The defendant violated the injunction, thus thwarting the judge's conclusion that the plaintiff should enjoy the substantive right. This reduces the judge to a retrospective, substitutionary remedy. He now must award the plaintiff the money previously considered inadequate. The plaintiff's remedy when the defendant violates an injunction, however, should represent more than the mere money damages that the judge would have awarded prior to the issuance of the injunction, had he not originally thought that damages were inadequate. The premise of the decision that money is an inadequate remedy is that the plaintiff should enjoy the substantive right in fact. The compensatory contempt doctrine should recognize that, because the judge originally rejected money as a remedy, the money award employed to remedy the violation of the injunction should take into consideration the initial decision to enjoin. The injunction failed to prevent the violation, but compensatory contempt may encourage the plaintiff to respect the injunction process, ameliorate some of the plaintiff's damages, and structure incentives to discourage future breaches.

This article analyzes compensatory contempt by tracing the legal issues associated with the remedy through the actual stages in which the remedy would be sought. Part II examines the commencement of compensatory contempt. Part III focuses on issues arising from compensatory contempt hearings, including jury trials and burdens of proof. Part IV discusses the calculation of compensatory contempt awards and Part V compares the collection of a contempt award with the collection of a money judgment.

II. Commencing Compensatory Contempt

When an aggrieved individual requests compensatory contempt, rather than bringing a separate and independent action, he simply makes a post-judgment motion. Compensatory contempt therefore remains a part of the injunction lawsuit[12] and results in several procedural ramifications. The aggrieved individual retains the right to request contempt only so long as his claim remains unsettled and unsatisfied. If the parties settle the underlying action the plaintiff loses the right to commence or continue compensatory contempt.[13]

12. Sumrall v. Moody, 620 F.2d 548, 550 (5th Cir. 1980). *But see* King v. Greenblatt, 489 F. Supp. 105, 106 (D. Mass. 1980) (dicta).

13. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 451 (1911); Backo v. Local 281, United Bhd. of Carpenters & Joiners, 438 F.2d 176, 182 n.3 (2d Cir. 1970); Flight Eng'rs Int'l Ass'n, EAL Chapter v. Eastern Air Lines, Inc., 301 F.2d 756 (5th Cir. 1962); Hendryx v. Fitzpatrick, 19 F. 810, 811-13 (C.C.D. Mass. 1884) (dicta); Moskovitz, *Contempt of Injunctions, Civil and Criminal*, 43 Colum. L. Rev. 780, 809 (1943); Note, *Injunction Negotiations: An Economic, Moral, and Legal Analysis*, 27 Stan. L. Rev. 1563, 1588-89 (1975). *Cf.* MacNeil v. United States, 236

The plaintiff initiates compensatory contempt by serving the defendant-contemnor with an order to show cause why contempt is not justified.[14] In an injunction action, the court enters an in personam order retaining jurisdiction to impose a contempt order, no matter where the conduct occurred.[15] The plaintiff need not serve process as he would if initiating a separate damages action. Instead, he serves process by mailing the documents to the contemnor or to the contemnor's attorney.[16] Nonetheless, the contemnor is entitled to specific information about the charges, a reasonable amount of time to prepare, and an opportunity to be heard.[17]

From the plaintiff's perspective, commencing compensatory contempt with a motion is manifestly superior to beginning a separate damage action. Retaining jurisdiction is easier than obtaining jurisdiction. The issues are adjudicated where the injunction proceeding took place and usually before the same judge. It may be difficult or impossible, on the other hand, to secure jurisdiction anew over a contemnor in the original court and to perfect service again upon an evasive litigant. A motion mailed to a contemnor or the contemnor's attorney is clearly

F.2d 149 (1st Cir. 1956). *But see* McComb v. Jacksonville Paper Co., 336 U.S. 187, 194-95 (1949) (dicta) (apparently confusing coercive and compensatory contempt). Conscious settlement must be distinguished from other methods of ending the controversy. For example, a court in one case granted an interlocutory injunction and the defendant appealed. The defendant neglected to comply while the appeal was pending. The appeal was later dismissed as moot because the defendant had begun to comply with the injunction. The court erroneously refused to award compensatory contempt to the plaintiff for the defendant's violations between the interlocutory injunction and the dismissal of the appeal. Pacific Gamble Robinson Co. v. Minneapolis & St. L. Ry. Co., 92 F. Supp. 352 (D. Minn. 1952). If the plaintiff suffered any damage from the defendant's violation of a valid interlocutory injunction, the court should have allowed the plaintiff to recover them in the injunction action as compensatory contempt instead of remitting the plaintiff to a separate action for damages. Backo v. Local 281, United Bhd. of Carpenters & Joiners, 438 F.2d 176 (2d Cir. 1970); Rivers v. Miller, 112 F.2d 439 (5th Cir. 1940) (recognizing the rule); Getka v. Lader, 71 Wis. 2d 237, 238 N.W.2d 87 (1976).

14. The order is commonly referred to as "an order to show cause." *See, e.g.*, Leman v. Krentler-Arnold Hinge Last Co., 284 U.S. 448, 450 (1932). In Massachusetts, the document is called a petition for attachment for contempt. Parker v. United States, 126 F.2d 370, 375 (1st Cir. 1942). *Compare* Loland & Hayes, *Contempt Proceedings: Another Dimension to Consumer Protection*, 14 SUFFOLK U.L. REV. 1, 22-23 n.158 (1980). *But see* King v. Greenblatt, 489 F. Supp. 105, 106 (D. Mass. 1980).

15. Leman v. Krentler-Arnold Hinge Last Co., 284 U.S. 448, 451 (1932); Franklin Mint Corp. v. Franklin Mint, Ltd., 360 F. Supp. 478 (E.D. Pa. 1973); Lyon v. Bloomfield, 355 Mass. 738, 247 N.E.2d 555 (1969). The plaintiff should be able to proceed against the contemnor for breach of an injunction in any state. All states should apply the enjoining state's law to compensate the plaintiff. Hughes v. Fetter, 341 U.S. 609 (1951); Broderick v. Rosner, 294 U.S. 629 (1935); R. LEFLAR, AMERICAN CONFLICTS LAW §§ 49, 74 (3d ed. 1977). Forums which do not recognize compensatory contempt, however, may be allowed either to decline the suit or to remit the plaintiff to a separate action on the ground that "full faith and credit does not automatically compel a forum state to subordinate its own statutory policy to a conflicting public act of another state . . . ." Hughes v. Fetter, 341 U.S. 609, 611 (1951).

16. *See, e.g.*, Leman v. Krentler-Arnold Hinge Last Co., 284 U.S. 448, 450-54 (1932); Aerovox Corp. v. Concourse Elec. Co., 90 F.2d 615 (2d Cir. 1937); People *ex rel.* Golden v. Golden, 57 A.D.2d 807, 394 N.Y.S.2d 699 (1977). *But cf.* United States v. Onan, 190 F.2d 1, 8 (8th Cir. 1951) (civil contempt notice personally served).

17. Smith v. Indiana State Bd. of Health, 158 Ind. App. 445, 303 N.E.2d 50, 56-58 (1973).

more expeditious and less expensive than service in hand. In a separate action, moreover, the pleading rules may allow delay, while a motion can be disposed of more promptly.[18]

In addition to these procedural problems, compensatory contempt raises the question of who can commence a compensatory contempt proceeding. When a court issues an injunction, the beneficiaries differ according to the circumstances. An injunction proscribing trespass may help only the plaintiff landowner, whereas another injunction prosecuted by the same landowner in a nuisance action against defendant's smoky chimney may purify the air for a township.

If any person allegedly injured by an injunction violation could resort to compensatory contempt, the policy of ensuring that defendants obey injunctions would be furthered. This philosophy underlies the first half of rule 71 of the Federal Rules of Civil Procedure: "When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the *same process* as if he were a party."[19]

On the other hand, the adversary system, antagonisms to party autonomy, and the idea of injunctions as individualized prohibitions militate against anyone but formal parties seeking contempt. Many courts today, moreover, interpret the "same process" language of rule 71 as incorporating intervention doctrines, standing rules, and issue preclusion analysis, thus limiting those who can seek a contempt order.

The traditional doctrine—limiting the class of individuals who may institute compensatory contempt proceedings—is the result of older opinions, resolving disputes in which plaintiffs sought recovery for violations of injunctions that protected real and personal property interest. Successors in interest, transferees, attorneys, receivers and stockholders—in short only those with a pecuniary interest in the breached order—could commence compensatory contempt.[20] Although an unrelated person could benefit, the early courts thought that injunctions were not equivalent to statutes or common law doctrines creating for anyone wronged a cause of action for compensatory contempt.[21]

Several developments, however, render the earlier decisions less relevant to modern litigation. First, courts have begun to recognize nonpecuniary "new property." Courts have asserted and defended individual interests in the new property, but much of this litigation has been conducted on behalf of sprawling, amorphous groups, with at-

18. *Compare* FED. R. CIV. P. 12 *with* FED. R. CIV. P. 78.

19. FED. R. CIV. P. 71 (emphasis added).

20. Frey v. Willey, 161 Kan. 196, 166 P.2d 659 (1946).

21. *See, e.g.*, Lyon v. Bloomfield, 355 Mass. 738, 247 N.E.2d 555 (1969); In re Niklaus, 144 Neb. 503, 13 N.W.2d 655 (1944).

tendant consequences for nonparties.[22] Second, the judicial trend in favor of intervention may facilitate increased nonparty intervention in injunction actions.[23] Courts have allowed individuals who obviously benefit from judgments to pursue the fruits of a party's victory through contempt[24] and execution.[25] Courts have also allowed nonparties to join the suit after judgment when intervention neither prejudices existing parties nor interferes substantially with orderly process.[26]

An alternative to intervention in an injunction lawsuit may often be the filing of a second suit with a plea of offensive collateral estoppel. A defendant who lost an equitable action may, in a later action for damages, be precluded from relitigating the factual issues.[27] Thus, a nonparty to an injunction may file a damage action against the enjoined defendant. The damaged plaintiff may employ the equitable findings to establish the defendant's liability, leaving only the amount of the plaintiff's damages to be adjudicated in the second action.

The recent case of *Northside Realty Associates, Inc. v. United States*[28] demonstrates the relationship between intervention for a contempt order and offensive issue preclusion. In *Northside Realty*, the Fifth Circuit refused to allow citizen-nonparties to recover compensatory contempt from a disobedient defendant in a statutory action brought by the federal government under the Fair Housing Act. Taking a narrow view of the litigation, the court suggested that nonparties who were injured when the defendant violated the injunction could sue in a separate action where the defendant would be entitled to a jury

22. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302 (1976).

23. Some courts discuss these issues in terms of standing. *See, e.g.*, Lasky v. Quinlan, 558 F.2d 1133 (2d Cir. 1977); United States v. ASCAP, 341 F.2d 1003 (2d Cir. 1965), *cert. denied*, 382 U.S. 877 (1965). Standing, however, launches an inquiry too amorphous, unfocused, and narrow to comprehend accurately the interests affected. *See* Rakas v. Illinois, 439 U.S. 128, 138-39 (1978). If rule 71 fails to provide sufficient guidance, judges should refer to the delay, party and judicial economy, the adversary premise, and obedience to the law.

24. Woods v. O'Brien, 78 F. Supp. 221 (D. Mass. 1948); City of Cincinnati v. Cincinnati Dist. Council 51, 35 Ohio St. 2d 197, 200-01, 299 N.E.2d 686, 690-91, 695 (1973) (special intervention statute for taxpayers). *Cf.* Farber v. Rizzo, 363 F. Supp. 386 (E.D. Pa. 1973) (injunction protected "members of the public").

25. United States v. Hackett, 123 F. Supp. 104 (W.D. Mo. 1954).

26. 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1916 (1969). *See, e.g.*, Hodgson v. U.M.W., 473 F.2d 118, 129 (D.C. Cir. 1972); Smuck v. Hobson, 408 F.2d 175, 181-82 (D.C. Cir. 1969). Decisions which forbid private litigants to intervene to enforce orders in litigation prosecuted by the government are designed more to ensure government control of government litigation than they are to effectuate a more general prohibition of post-judgment intervention. *See, e.g.*, National Labor Relations Bd. v. Shurtenda Steaks, Inc., 424 F.2d 192 (10th Cir. 1970); United States v. ASCAP, 341 F.2d 1003 (2d Cir. 1965); United States v. Paramount Pictures, Inc., 75 F. Supp. 1002 (S.D.N.Y. 1948). With the preceding cases, the reader should contrast the Ohio court's alacrity to allow a taxpayer to intervene to prosecute a contempt case against a municipal employee's union, after officials expressed their intent not to press contempt. City of Cincinnati v. Cincinnati Dist. Council 51, 35 Ohio St. 2d 197, 200-01, 299 N.E.2d 686, 690-91 (1973).

27. Parklane Hoisery Co. v. Shore, 439 U.S. 322 (1979).

28. 605 F.2d 1348, 1356-58 (5th Cir. 1979).

trial.[29] The court failed to recognize, however, that the intervention doctrine offered the defendant as much protection as a separate action. In remitting to a separate action those individuals the government sought to protect, the court did not consider the effects of issue preclusion. Under issue preclusion, the adjudication of issues in the first case would bind the defendant in the later case.

The court also confused contempt to compensate for past harm with contempt to coerce future obedience, observing that a compensatory award to nonparties "would have at best a tangential effect in coercing future compliance with the Court's decree."[30] The compensatory award would be considered reimbursement for past damages, not an inducement for future compliance. In addition, by accusing the government of attempting to "transform the civil contempt proceeding into a representative class action,"[31] the court revealed its anachronistic, bipolar view of a problem that calls for systematic, structural reform. If the court desired to fashion a remedy as broad as the wrong committed by the defendant, then all persons harmed should be represented by the government in the compensatory contempt proceedings, or the victims should be allowed to intervene in the injunction action.[32] The proper beacons to guide courts in determining who may institute or receive compensatory contempt should be the sophisticated and developing doctrines of issue preclusion and intervention, not concepts of standing and property law.

III. Hearings on Compensatory Contempt

After the court grants a motion for compensatory contempt and issues an order to the defendant to show cause for withholding contempt, the court holds a hearing to determine whether the contemnor violated the injunction and, if so, how much he should pay. A judge normally decides these issues on the basis of evidence submitted under oath and subjected to cross-examination in a trial hearing under rule 43(a) of the Federal Rules of Civil Procedure.[33] Generally, the complaining party must prove compensatory contempt by clear and convincing evidence before a judge presiding without a jury. A separate action to recover money might, on the other hand, be heard by a jury and would be proved by a preponderance of the evidence. Both the standard of proof and the defendant's right to a jury, however, are disputed issues in the compensatory contempt area.

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29. *Id.*

30. *Id.* at 1356.

31. *Id.* at 1357.

32. *See, e.g.*, Cohan & Hayes, *Contempt Proceedings: Another Dimension to Consumer Protection*, 14 Suffolk U.L. Rev. 1 (1980).

33. In federal courts, the trial hearing is held under rule 43(a). Sanders v. Monsanto Co., 574 F.2d 198 (5th Cir. 1978); Hoffman v. Beer Drivers Local 888, 536 F.2d 1268 (9th Cir. 1976); *see also* Smith v. Indiana State Bd. of Health, 158 Ind. App. 445, 456-60, 303 N.E.2d 50, 56-58 (1973).

The elements of compensatory contempt are violation and damages. If a plaintiff shows that the contemnor disobeyed the injunction the judge should grant a remedial award.[34] As Judge Magruder noted in *Parker v. United States*, the "court has no discretion to withhold the appropriate remedial order. . . . An order imposing a compensatory fine in a civil contempt proceeding is . . . analogous to a tort judgment for damages caused by wrongful conduct."[35] Injunctions, moreover, create strict liability. The contemnor's mental state is not an issue. In fact, the Supreme Court has noted that the "absence of willfulness does not relieve [one] from civil contempt. . . . [The order placed on contemnors] a duty to obey specified provisions of the statute. An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently."[36] The defendant's duty under an injunction, however, is unlike a tort duty owed by everyone to the world at large. The injunction proceeding personalizes the defendant's legal duty. Courts have held defendants to a standard of care greater than that imposed in tort cases and have placed an affirmative obligation upon defendants to comply with the court order. Poverty or inadvertence are not defenses[37] and corporations are responsible when an employee disobeys an injunction, even though top management is not aware of the employee's conduct and may even have forbidden his actions.[38] In fact, courts have warned defendants to observe carefully the fine line between compliance with an order and violation.[39] Those individuals enjoined "must do more than see how close they can come with safety to that which they were enjoined from doing."[40]

34. Union Tool Co. v. Wilson, 259 U.S. 107, 111-12 (1922); Parker v. United States, 153 F.2d 66, 70 (1st Cir. 1942); National Research Bureau, Inc. v. Kucker, 481 F. Supp. 612, 614 (S.D.N.Y. 1979); *but cf.* United Factory Outlet, Inc. v. Jay's Stores, Inc., 278 N.E.2d 716, 718 n.3 (Mass. 1972) (view expressed in *Parker* perhaps too inflexible). *See also* Moskovitz, *Contempt of Injunctions*, 43 COLUM. L. REV. 780, 793-96 (1943) (noting an exception for family support obligations).

35. Parker v. United States, 153 F.2d 66, 70 (1st Cir. 1946); *see also* Thompson v. Johnson, 410 F. Supp. 633, 643 (E.D. Pa. 1976).

36. McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949). *See also*, *e.g.*, West Tex. Util. Co. v. National Labor Relations Bd., 206 F.2d 442, 448 (5th Cir. 1953), *cert. denied*, 346 U.S. 855 (1953); Windham Bank v. Tomaszczyk, 27 Ohio St. 2d 7, 271 N.E.2d 815 (1971) (good faith and advice of counsel not defenses); Mathewson v. Primeau, 64 Wash. 2d 929, 934, 395 P.2d 183, 186 (1964) (willfulness unnecessary). *But see* Sander v. Morton, 518 F.2d 1084, 1087 (D.C. Cir. 1975).

37. National Research Bureau, Inc. v. Kucker, 481 F. Supp. 612, 615 (S.D.N.Y. 1979); United States v. Montgomery, 155 F. Supp. 633 (D. Mont. 1957).

38. Northside Realty Assoc., Inc. v. United States, 605 F.2d 1348, 1353-54 (5th Cir. 1980) (arguably independent contractors); Singer Mfg. Co. v. Sun Vacuum Stores, Inc., 192 F. Supp. 738, 741 (D.N.J. 1961); United Factory Outlet, Inc. v. Jay's Stores, Inc., 361 Mass. 35, 278 N.E.2d 716 (1972); Cohan & Hayes, *Contempt Proceedings: Another Dimension to Consumer Protection*, 14 SUFFOLK U.L. REV. 1, 11-12 (1980). *See also In re* Barnard, 48 N.J. Eq. 105, 21 A. 182 (1891).

39. World's Finest Chocolate, Inc. v. World Candies, Inc., 409 F. Supp. 840, 844 (N.D. Ill. 1976).

40. Esskay Drugs, Inc. v. Smith, Kline & French Laboratories, 188 F.2d 430, 432 (5th Cir. 1951); National Research Bureau, Inc. v. Kucker, 481 F. Supp. 612, 615 (S.D.N.Y. 1979); *but cf.* United Factory Outlet, Inc. v. Jay's Stores, Inc., 361 Mass. 35, 278 N.E.2d 716, 717 (1972) ("clear and undoubted disobedience of a clear and unequivocal command").

A. Burden of Proof: Preponderance or Clear and Convincing?

Courts disagree on the quantum of evidence required to prove the defendant's violation of the injunction and to establish the plaintiff's right to compensation. Of the two standards generally applied, clear and convincing proof is more exacting than the preponderance burden normally imposed in civil trials. Under the preponderance standard, the factfinder finds for the proponent when satisfied more probably than not that the evidence is in his favor. The factfinder seeking clear and convincing proof, however, finds for the proponent only when his contention is highly probable. The special clear and convincing standard originated in equity, although it has modern application in jury trials involving fraud, undue influence, reformation, and recission. Courts also appear to apply the clear and convincing standard to claims they disfavor on policy grounds, or when they fear that witnesses will lie.[41]

Courts have generally failed to articulate a rationale for requiring clear and convincing proof in compensatory contempt. Courts and other authorities who apply the more burdensome standard to compensatory contempt proceedings generally view compensatory contempt simply as civil contempt and cite as authority contempt decisions applying the more stringent standards of proof.[42] By failing to differentiate coercive from compensatory contempt, however, these decisions do not take into account the peculiar aspects of compensatory contempt that would justify application of a different standard to compensatory contempt.

This reasoning and the clear and convincing standard in compensatory contempt are impossible to accept. Courts should tell plaintiffs to prove the contemnor's violation and their damages by a simple preponderance of the evidence.[43] An enhanced burden makes some sense where the judge may imprison the contemnor to coerce, but this does not apply to compensatory contempt where the plaintiff only asks the judge to grant money. Compensatory contempt shifts the benefit of antisocial conduct from a wrongdoer to the one harmed. Unlike a prison sentence, the compensatory contempt extracted from the contemnor provides a benefit to the plaintiff. The clear and convincing standard is employed when courts are attempting to avoid erroneously imposing

41. Norman Bridge Drug Co. v. Banner, 529 F.2d 822, 829-30 (5th Cir. 1976).

42. *See, e.g.*, Northside Realty Assoc., Inc. v. United States, 605 F.2d 1348, 1352 (5th Cir. 1980); Shakman v. Democratic Organization of Cook County, 533 F.2d 344, 351 (7th Cir. 1976); National Labor Relations Bd. v. San Francisco Typographical Union, 465 F.2d 53, 57 (9th Cir. 1972); Moskovitz, *Contempt of Injunctions, Civil and Criminal*, 43 COLUM. L. REV. 780, 818-19 (1943). *But see* State *ex rel.* Seattle Bottlers Ass'n v. Flora Co., 169 Wash. 120, 13 P.2d 467 (1932) (preponderance standard in compensatory contempt). *See also* C. WRIGHT & A. MILLER, 11 FEDERAL PRACTICE & PROCEDURE § 2960, at 205-06 n.99 (1973) (wherein the courts are said to apply clear and convincing standard in all civil contempt proceedings).

43. State *ex rel.* Seattle Bottlers Ass'n v. Flora Co., 169 Wash. 120, 13 P.2d 467 (1932).

compensatory contempt more than they are attempting to avoid exonerating contemnors. This contrasts with the preponderance standard that courts generally apply in a civil adjudication for money. The preponderance standard assumes that erroneous imposition of damages and exoneration of wrongdoing similarly dilute the legal rule's deterrent effect. Thus, the standard weighs them equally.[44] Judicial application of compensatory contempt should be governed by the ordinary preponderance standard.

The clear and convincing evidence standard makes even less sense when the plaintiff may choose between compensatory contempt and a separate damage action with a preponderance standard. The clear and convincing burden discourages plaintiffs from seeking compensatory contempt, encouraging them to file separate damage actions and thereby promotes inefficient use of judicial resources. The plaintiff's burden in compensatory contempt should never exceed his burden in a separate action for damages. Unless the burden of proof in a separate action is clear and convincing, the compensatory contempt burden should be a preponderance of the evidence.[45]

Clear and convincing evidence in compensatory contempt actions is also inconsistent with the prerequisite that money damages represent an inadequate remedy. The judge must make such a determination prior to the issuance of an injunction. When the defendant disobeys the injunction, the judge awards the plaintiff the money previously considered to be inadequate. Consequently, the judge should refuse to impose a higher hurdle of proof in compensatory contempt than the plaintiff would have encountered suing the defendant separately for the inadequate money remedy. In proving the inadequacy of damages, moreover, the plaintiff already met an effectively more stringent standard of proof than the mere preponderance test.

These three rationales—the consideration of money damages as inadequate, the desire to use judicial resources efficiently, and the need in civil damage actions to weigh exoneration and the erroneous imposition of damages equally—present a strong argument for applying the preponderance standard in compensatory contempt proceedings. Because of the peculiar aspects of the monetary compensation, moreover, these three arguments also justify application of the lesser standard to compensatory contempt actions, even though the jurisdiction may apply the clear and convincing standard in coercive contempt proceedings.

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44. R. POSNER, ECONOMIC ANALYSIS OF LAW § 21.3 (1977) [hereinafter cited as R. POSNER].

45. *But see* Special Committee of the Junior Barristers of the Los Angeles Bar Association, *Civil and Criminal Contempt in the Federal Courts*, 17 F.R.D. 167, 174 (1954) (in which it is stated that the plaintiff must establish the acts complained of by clear and convincing evidence in a civil contempt proceeding in federal court).

B. Factfinders: Judge or Jury?

In addition to the controversy over standard of proof, questions also arise around whether to use a jury to hear claims for compensation in a compensatory contempt proceeding. The problem results from the historical phenomenon of the dual court system: a law judge with a jury granting damages, and an equity chancellor across the hall issuing injunctions. Today, although those courts are merged, a major difference persists. Judges try injunction actions without juries but empanel juries to hear money claims. Deciding where to try actions for breach of injunctions in which money damages are sought is like the hypothetical railroad ticket agent's dilemma: whether to put a centaur in the train's livestock or passenger car.

The historical dichotomy presents three options. The first, already dismissed, suggests that the plaintiff file a separate action for damages. The other two are variations on the normal pattern of juryless injunction and contempt proceedings. Both variations retain compensatory contempt as part of the injunction action. One, however, provides for the empaneling of a jury for determination of damages. The other variation allows the judge to rule on damages.

The federal courts and a majority of states maintain compensatory contempt without a jury.[46] Several states and the United States have statutes that authorize or are read to authorize compensatory damages in contempt.[47] These courts apparently reason that contempt remains part of the original injunction action. And because equity should provide full relief, power to grant compensatory relief is inherent in the power to enjoin. Further, the nonjury aspect of enjoinment carries over to compensatory contempt.[48]

Other courts reject compensatory contempt.[49] California remits

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46. United States v. U.M.W., 330 U.S. 258, 298 (1947); Leman v. Krentler-Arnold Hinge Last Co., 284 U.S. 448 (1932). In the state courts, recent holdings with clear statements on the law in this area are difficult to find. Older, technical opinions abound and inconsistent holdings within states exist. Recent decisions include, *e.g.*, Mitchell v. All States Business Prods. Corp., 232 F. Supp. 624 (E.D.N.Y. 1964); South Dade Farms, Inc. v. Peters, 88 So. 2d 891 (Fla. 1956); Jones v. Wright, 35 Md. App. 313, 370 A.2d 1144 (1977); *see also* Annot., 85 A.L.R.2d 895 (1978).

47. 18 U.S.C. § 402 (1976); ARIZ. REV. STAT. § 12-863(C) (Supp. 1957-1979); KAN. STAT. § 60-909 (1976); MICH. COMP. LAWS ANN. § 600.1721 (1968); MINN. STAT. ANN. § 588.11 (1947); N.Y. JUD. LAW. § 773 (McKinney Supp. 1979-80); N.D. CENT. CODE § 27-10-04(1) (1974); OHIO REV. CODE ANN. § 2727.12 (Page 1954); OKLA. STAT. ANN. tit. 12, § 1390 (West Supp. 1979-80); OR. REV. STAT. § 33.110 (1975); TENN. CODE ANN. § 23-904-905 (Supp. 1979); UTAH CODE ANN. § 78-32-11 (1977); WASH. REV. CODE ANN. § 7.20.100 (1961); WIS. STAT. ANN. § 295.14 (West 1958). Annot., 85 A.L.R.3d 895 (1978) lists the following jurisdictions as having decisions reflecting these statutes: United States, Colorado, Kansas, Minnesota, New York, North Dakota, Ohio, Oklahoma, Tennessee, Utah, Washington, and Wisconsin.

48. Root v. MacDonald, 260 Mass. 344, 361-63, 157 N.E. 684, 690-91 (1927); Barber v. George R. Jones Shoe Co., 80 N.H. 507, 120 A. 80 (1923); Stimpson v. Putnam, 41 Vt. 238 (1867); Moskovitz, *Contempt of Injunctions, Civil and Criminal*, 43 COLUM. L. REV. 780, 805 (1943).

49. Round Lake Sanitary Dist. v. Basic Elecs. Mfg. Corp., 60 Ill. App. 3d 40, 376 N.E.2d 436 (1978); H.J. Heinz Co. v. Superior Court, 42 Cal. 2d 164, 266 P.2d 5 (1954); Edrington v. Pridham, 65 Tex. 612 (1886); Annot., 85 A.L.R. 3d 895 (1978) (The Annotation also lists Alabama, Arkan-

the plaintiff aggreived by the breach of an injunction to an ordinary civil action.[50] Alabama allows plaintiffs to recover compensation in an ancillary proceeding in the injunction action where either party may be entitled to a jury trial.[51] Oklahoma's constitution requires a jury in civil compensatory contempt.[52]

A major premise of the decisions refusing to permit the remedy of compensatory contempt appears to be that actions to recover money are heard before juries instead of in the juryless chancellory.[53] These courts hold that they lack statutory or precedential authority to sanction compensatory relief in civil contempt proceedings.[54] Statutes that provide for fines or imprisonment limit the courts to punishment and exclude other remedies.[55] The courts also reason that the statutory word "fine" cannot be expanded to include compensation, because it means a penalty paid to the public, not to the plaintiff.[56] Under this rejectionist rationale, contempt penalizes the contemnor and vindicates the court's authority; it does not provide a remedy for a private litigant.[57] In these jurisdictions, courts may employ civil contempt to enforce the injunction, apparently by coercion, but not to grant damages.[58] The aggrieved beneficiary of an injunction may, however,

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sas, Idaho, Indiana, Montana, Nebraska, and North Carolina in this group. Federal courts in diversity actions follow federal practice in awarding compensatory contempt, although clear holdings are difficult to find.) *See* Folk v. Wallace Business Forms, Inc., 394 F.2d 240 (4th Cir. 1968) (North Carolina); Sunbeam Corp. v. Golden Rule Appliance Co., 252 F.2d 467, 470 (2d Cir. 1958) (rejecting New York contempt statute); Berry v. Midtown Serv. Corp., 104 F.2d 107, 109 (2d Cir. 1939) ("New York cases cannot be controlling upon the federal courts whose power to punish for contempt is limited by a federal statute."); Guaranty Trust Co. v. York, 326 U.S. 99, 106 (1945) ("State law cannot define the remedies which a federal court must give simply because a federal court in diversity jurisdiction is available as an alternative tribunal . . . . Contrariwise, a federal court may afford an equitable remedy for a substantive right recognized by a State even though a State court cannot give it.").

50. H.J. Heinz Co. v. Superior Court, 42 Cal. 2d 164, 266 P.2d 5 (1954).

51. Moody v. State *ex rel.* Payne, 355 So. 2d 1116 (Ala. 1978), *cert. denied*, 439 U.S. 910 (1978).

52. *Ex parte* Stephenson, 89 Okla. Crim. 427, 209 P.2d 515 (1949); Clark v. Most Worshipful St. John's Grand Lodge, 198 Okla. 621, 624-25, 181 P.2d 229, 233 (1947).

53. *See generally* Note, *Procedures for Trying Contempts in the Federal Courts*, 73 HARV. L. REV. 353, 355 (1959).

54. *See, e.g.*, Lightsey v. Kensington Mortgage & Fin. Co., 294 Ala. 281, 315 So. 2d 431 (1975); H.J. Heinz Co. v. Superior Court, 42 Cal. 2d 164, 266 P.2d 5 (1954); Levan v. Third Dist. Court, 4 Idaho 667, 43 P. 574 (1896).

55. Ragsdale v. Bryan, 235 Ga. 58, 218 S.E.2d 809 (1975); United Artists Records, Inc. v. Eastern Tape Corp., 18 N.C. App. 183, 196 S.E.2d 598, *cert. denied*, 283 N.C. 666, 197 S.E.2d 880 (1973); State *ex rel.* Flynn v. Fifth Judicial Circuit, 24 Mont. 33, 60 P. 493 (1900).

56. Rothschild & Co. v. Steger & Sons Piano Mfg. Co., 256 Ill. 196, 99 N.E. 920 (1912); State *ex rel.* Flynn v. Fifth Judicial Circuit, 24 Mont. 33, 60 P. 493 (1900); *In re* Rhodes, 65 N.C. 518 (1871).

57. *See, e.g.*, H.J. Heinz Co. v. Superior Court, 42 Cal. 2d 164, 266 P.2d 5 (1954); Eberle v. Greene, 71 Ill. App. 2d 85, 217 N.E.2d 6 (1966); Dunlavey v. Doggett, 38 Mont. 204, 99 P. 436 (1909).

58. Eberle v. Greene, 71 Ill. App. 2d 85, 217 N.E.2d 6 (1966); Kasparek v. May, 174 Neb. 732, 119 N.W.2d 512 (1963); Hallam v. Alpha Coal Corp., 122 W. Va. 454, 9 S.E.2d 818 (1940).

recover money either in a separate jury action[59] or in a ancillary proceeding in the injunction suit where either party may summon a jury.[60]

The argument that actions for damages must always be heard by a jury misunderstands the inadequacy prerequisite and the jury's role. As previously noted, a judge must determine that money damages are an inadequate remedy before issuing an injunction. Consequently, compensatory contempt cannot be viewed as the equivalent of a separate damage action.[61] Before enjoining the defendant, the judge rejected money and proceeded without a jury to prevent the defendant from impinging upon the plaintiff's right. Now it is too late to prevent harm. Having excluded a jury from the decision to enjoin to protect the right, the judge should satisfy violation of the injunction without a jury.[62]

Observers assert that a jury's common sense keeps "the administration of the law in accord with the wishes and feelings of the community."[63] The judicial or legislative decision to protect a substantive right with injunctions is, however, a generalized decision that the right is too important to submit to possible jury tampering or compromise. A jury in a compensatory contempt proceeding following violation of an injunction simply delays possible jury tampering from the injunction to the damage stage. Courts should adhere to the decision to exclude the jury in protecting the plaintiff's right, even when redressing breaches of the injunction. Perceiving juryless compensatory contempt as a function of the inadequacy prerequisite answers several of the arguments for a separate action.

The notion that contempt is only punitive or coercive ignores the fact that the judge must advance the plaintiff's substantive interest when the injunction itself has failed. Even without a statute authorizing compensatory damages in contempt, courts possess the power to grant damages for violations of legal duties, to decide whether damages are inadequate, and to enjoin. As part of that power, moreover, courts should possess the ability to restore the plaintiff to the position occupied prior to the defendant's failure to comply with the injunction at

59. *See, e.g.*, Round Lake Sanitary Dist. v. Basic Elec. Mfg. Corp., 60 Ill. App. 3d 40, 376 N.E.2d 436 (1978); Kasparek v. May, 174 Neb. 732, 741, 119 N.W.2d 512, 519 (1963).

60. Lightsey v. Kensington Mortgage & Fin. Co., 294 Ala. 281, 315 So. 2d 4431 (1975). *But cf.* Elliott v. Burton, 19 N.C. App. 291, 198 S.E.2d 489 (1973) (second action may be barred).

61. *But cf.* O. FISS, THE CIVIL RIGHTS INJUNCTION 54 (1978).

62. *See* Dobbs, *Contempt of Court—A Survey*, 56 CORNELL L. REV. 183, 278 (1971). The law in two states with juries in injunction actions, Texas and North Carolina, is consistent with this choice in compensatory contempt proceedings; they remit plaintiffs to separate jury actions to sue defendants for violations of injunctions. United Artists Records, Inc. v. Eastern Tape Corp., 18 N.C. App. 183, 196 S.E.2d 598 (1973), *cert. denied*, 283 N.C. 666, 197 S.E.2d 880 (1973); Edrington v. Pridham, 65 Tex. 612 (1886). If juries are to participate in compensatory contempt, an ancillary proceeding in the injunction action is more economical and quicker than a separate action. *See* Moody v. State *ex rel.* Payne, 355 So. 2d 1116 (Ala.), *cert. denied*, 439 U.S. 910 (1978).

63. O.W. HOLMES, COLLECTED LEGAL PAPERS 238 (1920).

least to the extent possible by monetary remuneration.[64] The Supreme Court has ruled that the "power to impose a fine is properly treated as ancillary to the federal court's power to impose injunctive relief. . . . [t]he line between retroactive and prospective relief cannot be so rigid that it defeats the effective enforcement of prospective relief."[65] Compensatory contempt remains part of the injunction action and should retain injunctive attributes while furthering the substantive interest.

The use of juries in compensatory contempt proceedings and separate actions for damages for injunction violations appears to be a procedural anachronism remaining from the time of dual courts—one with power to enjoin, another with power to grant damages. Both procedures raise two variations on the basic issue in contempt procedure: must the legislature pass a specific statute before courts may adjudicate a form of contempt? Should a judge share decisionmaking power with a jury? In this instance, "no" is the proper answer to both questions. Under modern conceptions that law and equity are merged, the judge should accord in one action the remedy the situation merits.[66] If common law or legislation has armed courts to determine whether damages are inadequate, the decision to exclude the jury and enjoin should carry through from the adjudicatory stage to the enforcement process. The court, in short, should respect the right of a private litigant to obtain compliance or a substitute; it should reject procedures that inhibit legitimate assertions of substantive rights.

IV. Measuring Compensatory Contempt

Although this article has articulated a standard of proof, and has determined who should decide when to apply compensatory contempt, a major issue remains: How is compensatory contempt measured? A basic irony brazenly confronts the judge: before enjoining, the judge concluded that money was not equivalent to the threatened right and that damages were inadequate; yet after the defendant breaches the injunction, the judge must mete out a substitute remedy that reflects the principle that the plaintiff should enjoy the substantive right. The judge must shape a money remedy to foster both the policy underlying the decision to enjoin and the substantive purpose of the cause of action that justified the injunction's issuance. Courts should first serve the goals of the underlying cause of action by measuring the compensatory contempt award the same way a judge would measure injury in a separate damage action. Although this may incidentally reflect the decision to enjoin, those policies are best furthered in the secondary and

64. Labor Relations Comm'n v. Boston Teachers Union, Local 66, 374 Mass. 79, __, 371 N.E.2d 761, 770 (1977).

65. Hutto v. Finney, 437 U.S. 678, 691, 690 (1978) (compensatory award from public funds is prospective, injunctive, and constitutional, rather than retroactive and unconstitutional monetary relief).

66. Jones v. Wright, 35 Md. App. 313, 320, 370 A.2d 1144, 1148 (1977).

discrete part of the remedial calculation. Courts should augment compensatory contempt awards by charging the contemnor with the plaintiff's costs in defending and enforcing the injunction, including the litigation costs and attorney's fees. As determined in the decision to enjoin, a damage award itself is inadequate. Thus, to advance the inadequacy prerequisite underlying the injunction, courts should consciously place the cost to enforce on the contemnor.

A. Vindicating the Underlying Cause of Action

1. Formulating the Award

Courts usually measure the amount of the compensatory contempt award by the plaintiff's "actual losses."[67] Actual loss is generally used for either of two definitions, both of which are inapposite for a compensatory contempt award. First, "actual loss" may mean that courts measure damages only by a plaintiff's loss, rejecting the contemnor's gain. Courts should develop a less uniform, but more precise, criterion than actual loss. Compensatory contempt damages should be determined by the applicable substantive law's standard of remedial damages, even if that means including the contemnor's gain.

"Actual loss" may also mean that the plaintiff cannot recover any punitive damages.[68] If the underlying cause of action on which the injunction is based allows punitive damages in a separate action, and if the contemnor's misconduct otherwise merits punitive damages, then judges should grant punitive damages. For the price of an awkward contradiction in terms, punitive damages in compensatory contempt proceedings will promote the substantive standard, reflect the inadequacy prerequisite, and replace some of the work accomplished by imposing criminal contempt fines.

Compensatory contempt performs many useful functions. If the judge enjoined the defendant because he was judgment-proof, but can now pay, compensatory contempt suffices. Second, if it costs the defendant less to comply than the plaintiff's actual damages, compensatory contempt discourages disobedience. And when the plaintiff's actual losses are at least equal to the defendant's gains, compensatory contempt will deter non-compliance.[69] Further, an order to show cause why compensatory contempt should not be issued often awakens a somnolent sense of urgency. Until the order is received, defendants may fail to take prompt and energetic steps to communicate injunctions

67. *See, e.g.*, Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 447 (1911); Allied Materials Corp. v. Superior Prods. Co., 620 F.2d 224, 227 (10th Cir. 1980); Yanish v. Barber, 232 F.2d 939, 944 (9th Cir. 1956); Parker v. United States, 153 F.2d 66, 71 (1st Cir. 1946); Chemical Fireproofing Corp. v. Bronska, 553 S.W.2d 710, 715 (Mo. App. 1973). *See generally* Moskovitz, *Contempt of Injunctions, Civil and Criminal*, 43 COLUM. L. REV. 780, 806-08 (1943).

68. Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 278 (1971).

69. Note, *Injunction Negotiations: Economic, Moral and Legal Analysis*, 27 STAN. L. REV. 1563, 1592-93 (1975) (using the terms "deterrent" and "compensation levels").

to subordinates and to begin to comply.[70] The substantive purpose of the cause of action underlying the injunction, however, can be furthered if the contempt court would measure the award in the same manner as a damage court.

Legislatures have produced a noteworthy model in presenting exclusive proprietary rights enforceable by injunction. In the patent, trademark, and copyright areas, for example, policymakers created exclusive rights in statutory monopolies to subsidize innovation. Proprietors often exchange their exclusive rights for valuable consideration.[71] The proprietor takes the licensee's money in exchange for the exclusive right. The right to exercise the monopoly flows to the licensee who values it more highly than the money the proprietor receives. Bargained transactions allocate resources efficiently. The competitive process assesses the proprietor's innovation and allows the licensee, who should be able to exploit the innovation efficiently, to exercise the monopoly.

Sound remedial policy seeks rules to encourage people to bargain voluntarily instead of resorting to coercive judicial transactions, which are expensive and potentially inaccurate.[72] A damage theory based on the proprietor's loss may not encourage others to bargain voluntarily with proprietors. An efficient and businesslike but unscrupulous infringer may gain more from infringing on the plaintiff's rights than an inefficient proprietor may lose; this callous infringer may be willing to infringe now and pay later, and let a judge set the price instead of negotiating with the proprietor. To destroy this sort of profit incentive, many remedial systems apportion damages by the wrongdoer's gain. To advance the purpose of the substantive rules, the compensatory contempt court should follow a damage theory based on the contemnor's profit if a court could grant such an award in a damage action.[73]

This model has several advantages. It encourages potential infringers to bargain privately with proprietors. If the infringer is enjoined and then violates the injunction, measurement by the contemnor's gain avoids the burden and expense of a separate damage action, enforces the substantive standard of the underlying cause of action, and lets the contempt court rely on well-developed bodies of re-

70. *See, e.g.*, Landman v. Royster, 354 F. Supp. 1292 (E.D. Va. 1973); Babee-Tenda Corp. v. Scharco Mfg. Co., 156 F. Supp. 582, 586 (S.D.N.Y. 1957).

71. Baxter, *Legal Restrictions on Exploitation of the Patent Monopoly: An Economic Analysis*, 76 YALE L.J. 267, 275-79 (1966).

72. *See* R. POSNER, *supra* note 44, §§ 7.2, 19.1.

73. Broadview Chem. Corp. v. Loctite Corp., 311 F. Supp. 447, 449 (D. Conn. 1970) (in dealing with violations of an injunction forbidding patent infringement, court "not bound" by patent damage statute. But "since that statute relates to the subject matter underlying the contempt and both parties refer the court to it, it is not inappropriate to utilize it to measure the damages . . . ."); Nova Indus. Corp. v. Nissen, 30 Wisc. 2d 123, 130-31, 140 N.W.2d 280, 283-84 (1966) (injunction based on contract). *See also* Northside Realty Assoc., Inc. v. United States, 605 F.2d 1348, 1355-56 (5th Cir. 1979); National Research Bureau v. Kucker, 481 F. Supp. 612, 615-16 (S.D.N.Y. 1979).

medial doctrine. If the contemnor violated an injunction forbidding interference with the plaintiff's land, the judge should follow other courts and measure damage by an appropriate theory such as rental value[74] or diminished value.[75] Similarly, the plaintiff should recover for lost good will or reputation when the contemnor breaches an injunction that protects the plaintiff's trademark and prevents unfair competition.[76] If the damage action's remedial structure measures damages by the defendant's gain, then a judge should apportion compensatory contempt in that manner.[77] This may compel the contemnor to account to the plaintiff for profits.[78] "Actual loss" as a separate criterion for compensatory contempt should be restricted to contempt without analogous money measures.[79]

Courts generally base money damage for breach of contract on the profit lost by the nonbreaching party. They do not intend to prevent all breaches of contract. When gain from breach exceeds cost, a maximizing party is encouraged to abort a contract and pay the other party's lost profit.[80] Lost profit to the nonbreaching party is efficient because no one suffers, some improve their positions, and resources move toward more optimal uses.[81] In deciding to enjoin or to order specific performance of a contract, the court concludes that damages are unsatisfactory and rejects money as a remedy. While damage theory encourages efficient breach of contracts, efficient violation of injunctions frustrates the policies of both the inadequacy prerequisite and the decision to compel specific performance. Substantive contract remedies based on lost profit are inadequate when the judge concluded earlier that the defendant should perform. When measuring by the victim's loss fails to limit antisocial conduct, society should impose additional costs on wrongdoers.[82] Basing compensation on the plaintiff's objective

74. Lyon v. Bloomfield, 355 Mass 738, 247 N.E.2d 555 (1969). D. DOBBS, *supra* note 6, § 5.3, at 333, § 5.8, at 365.

75. Chadwick v. Alleshouse, 250 Ind. 348, 233 N.E.2d 162 (1968).

76. AMF Inc. v. International Fiberglass Co., 469 F.2d 1063 (1st Cir. 1972); D. DOBBS, *supra* note 6, § 6.5, at 480.

77. Leman v. Krentler-Arnold Hinge Last Co., 284 U.S. 448, 457 (1932).

78. *See, e.g.*, W.E. Bassett Co. v. Revlon, Inc., 435 F.2d 656, 664-65 (2d Cir. 1970) (trademark injunction breached); Textay Co. v. Hayslip, 192 F.2d 435 (5th Cir. 1951); National Research Bureau, Inc. v. Kucker, 481 F. Supp. 612, 615 (S.D.N.Y. 1979); D. DOBBS, *supra* note 6, § 6.5, at 480 (1973). *See also* Schlegel Mfg. Co. v. King Aluminum Corp., 381 F. Supp. 649, 654 (S.D. Ohio 1974) (patent injunction infringed). For the muddled state of allowing profits in patent infringement, see D. DOBBS, *supra* note 6, § 6.2 at 441-42. *But see* Davidson v. Munsey, 29 Utah 181, 187-90, 80 P. 743, 744-45 (1905). *But cf.* Sunbeam Corp. v. Golden Rule Appliance Co., 252 F.2d 467, 470 (2d Cir. 1958); National Drying Mach. Co. v. Ackoff, 245 F.2d 192, 193 (3d Cir.), *cert. denied*, 355 U.S. 832 (1957) (questioning unjust enrichment measure in compensatory contempt). World's Finest Chocolate, Inc. v. World Candies, Inc., 409 F. Supp. 840, 846 (N.D. Ill. 1976) (trademark consent judgment violated).

79. Lightsey v. Kensington Mortgage & Fin., 294 Ala. 281, 287-88, 315 So. 2d 431 (1975); Moskovitz, *Contempt of Injunctions, Civil and Criminal*, 43 COLUM. L. REV. 780, 824 (1943).

80. R. POSNER, *supra* note 44, § 4.9 (1977).

81. *Id.* §§ 4.9, 6.12, 19.1. Posner refers to such a breach as an "efficient breach."

82. *Id.* § 7.1.

losses impedes fulfillment of the goal of the adequacy prerequisite. In addition, it may not be feasible to ascertain the plaintiff's loss. The judge may have issued the injunction initially because the plaintiff's interest was too expensive to determine or too subjective to valuate in money. Hence, granting damages creates a substantial risk that the plaintiff will be undercompensated.[83] The judge should prevent the reimposition of this risk of imprecise compensation by forbidding the defendant from expeditiously disobeying the injunction and preventing the defendant from enjoying the right.

Under the foregoing "actual loss" formula, the defendant's breach of an injunction converts the plaintiff's right to enjoin into an inferior action for damages. As an alternative, authorizing the plaintiff to recover the contemnor's gain as compensatory contempt may obviate some of the risk of undercompensation inherent under the actual loss theory. Inclusion of the contemnor's gain in the formula also eliminates potential profit from breach, increases the chance that the defendant will either comply or negotiate with the plaintiff, and reflects the original decision to enjoin.[84] But it would be futile to argue that the contemnor's objective gain equals the plaintiff's subjective loss, and while measurement by his gain may reflect the policies of the inadequacy prerequisite, it falls short of fully vindicating those policies. Those policies are fully vindicated only upon total compliance with the injunction; thus any proposal for damages can represent no more than a "second-best" solution.

2. *Special Damage Provisions: Multiple, Minimum, and Punitive Damages*

Whereas the policies underlying the inadequacy prerequisite may not be fully vindicated in the compensatory contempt award, it can nonetheless vindicate more effectively the substantive purpose of the underlying cause of action. Adopting the remedial structure of the underlying cause of action incorporates the substantive purposes of that area of the law into the injunction action and compensatory contempt award. Full vindication of the underlying substantive purposes, however, requires adoption of the total remedial structure. This structure must include special damage provisions, even if the provisions are an anathema to the ideal of "compensation." The special damage provisions commonly provide for an automatic multiplication of damages, a minimal level of damages, and punitive damages.

a. Multiplication of Damages

In those remedial structures allowing plaintiffs to recover multiples

83. This paragraph is based on Note, *Injunction Negotiations: An Economic, Moral and Legal Analysis*, 27 STAN. L. REV. 1563, 1592-93 (1975).

84. *Compare* Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 378-82 (1978).

of damages, such as in waste,[85] patent,[86] timber trespass,[87] and antitrust[88] cases, policymakers anticipate that potential wrongdoers discount damages by the chance of enforcement. The threat of multiple damages lowers the potential violators' incentives to violate the law. Multiple damages, consequently, are designed to do more than merely compensate the victim for his loss. In addition, multiplication of damages encourages victims to sue, penalizes bad faith or intentional miscreants, and recognizes both that actual damages may be difficult to prove and that wrongdoers may conceal their deeds and elude apprehension.

If courts in compensatory contempt proceedings adopt the damage theory from the underlying substantive law being enforced, a judge should multiply damages when the contemnor disobeys an injunction. The skeptic may argue that multiplication of damages in compensatory contempt is unnecessary. He may assume that a plaintiff will police an injunction more carefully than a would-be violator would honor rights subject to multiple damages but unprotected by an injunction. If the multiple standard is available in a damage action, however, it should be extended to a compensatory contempt plaintiff on the same terms.[89] Multiplication of damages promotes the substantive standard upon which the injunction is based and vindicates the principles that mandate the substantive remedy in compensatory contempt.

Multiple damages in compensatory contempt also advance the inadequacy prerequisite. Multiple damages may be granted because actual damages are hard to prove. This practice resembles the issuance of an injunction to protect legally recognizable but subjective impairment of rights. Multiple damages in compensatory contempt actions encourage the defendant to either obey the legal standard or negotiate privately. In this sense, multiplication also furthers the inadequacy prerequisite and allows the plaintiff to enjoy the right in question.[90]

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85. *See, e.g.*, MINN. STAT. ANN. § 561.17 (West 1974). D. DOBBS, *supra* note 6, § 5.1, at 319 n.65.

86. 35 U.S.C. § 284 (1976).

87. *See, e.g.*, CONN. GEN. STAT. ANN. § 52-560 (West Supp. 1980). D. DOBBS, *supra* note 6, § 5.2, at 324 n.22.

88. 15 U.S.C. § 15 (1976).

89. Ransburg Electro-Coating Corp. v. Proctor Elec. Co., 242 F. Supp. 28, 39 (D. Md. 1965); Baltz v. Walgreen Co., 198 F. Supp. 22, 26-27 (W.D. Tenn. 1961); Carter Prods. v. Colgate-Palmolive Co., 164 F. Supp. 503, 509 (D. Md. 1958). *But see* Broadview Chem. Corp. v. Loctite Corp., 311 F. Supp. 447, 453-54 (D. Conn. 1970) (wherein the court refused to multiply for several reasons: multiplied damages may be punitive, contemnor violated a consent decree not an injunction, plaintiff could have brought a separate action, compensatory contempt measures govern instead of the patent statute, and full discovery allowed the plaintiff to be compensated fully).

90. One court doubled damages after the contemnor breached an injunction forbidding patent infringement. The court held that the patent statute did not control but that the "inherent discretion possessed by a court to correct willful violations of its solemnly passed orders" did govern. Dow Chem. Co. v. Chemical Cleaning, Inc., 434 F.2d 1212, 1215 (5th Cir. 1970). *See also* Brooks v. Brooks, 131 Vt. 86, 93, 300 A.2d 531, 535 (1973) (cash bond forfeited to plaintiff in part to punish contemnor for violating court order). Multiplying compensatory contempt when the

b. Minimum Damages

Statutory minimum damages perform a somewhat different function than multiplied damages. The Copyright Act, for example, authorizes plaintiffs to recover the proprietor's loss or the infringer's gain. In addition, a plaintiff may decline to prove damage or profit and instead elect statutory damages, generally between $250 and $10,000.[91] This floor recovery strengthens the substantive standard by discouraging small infringements, each of which causes only minute damage individually, but great damage cumulatively. The minimum damage amount, moreover, creates an incentive to sue, inspiring copyright proprietors to protect their exclusive rights. For these reasons, a court employing compensatory contempt to enforce an injunction against copyright infringement should let the proprietor elect statutory damages. The statutory contempt minimum promotes the substantive purpose and also supports the inadequacy prerequisite with a margin of money for the impalpable interest that led policymakers to decide that damages were inadequate in the first place.[92]

New York's compensatory contempt statute authorizes a recovery of $250 for plaintiffs who fail to show a compensable "actual loss or injury."[93] New York's floor may be either a punitive fine paid to the plaintiff, a bounty to encourage plaintiffs to enforce injunctions, an estimate of the noncompensable impairment that led to the injunction, a statutorily-triggered coercive fine, or a sword of Damocles hanging over defendant's head to deter violation. The New York Court of Appeals, however, interpreted it as a minimum compensatory recovery, not as a punitive or exemplary measure.[94] The mandated minimum recovery promotes the substantive standard by encouraging plaintiffs to enforce injunctions. The legislature may have also estimated a lower limit on uncompensable subjective impairment, and the minimum sum may thus reflect the inadequacy prerequisite. Because the minimum sum has not been adjusted for inflation in this century, however, $250

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substantive standard and the facts allow is the correct procedure to follow. But the judge should multiply damages to vindicate the substantive standard and reflect the inadequacy prerequisite, rather than to punish. Although punitive damages have a place in compensatory contempt, the judge should grant punitive damages separately and consciously.

91. 17 U.S.C. § 504(c)(1) (Supp. II 1978). *See also* U.C.C. §§ 9.404(1)-507(1).

92. Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CALIF. L. REV. 1242, 1284 (1979); *compare* Rendleman, *The New Due Process: Rights and Remedies*, 63 KY. L.J. 531, 666-67 (1975) (suggests minimum damage schedule for violations of constitution); Note, *Damage Awards for Constitutional Torts: A Reconsideration After Carey v. Piphus*, 93 HARV. L. REV. 966, 988-90 (1980) (same).

93. N.Y. JUD. LAW § 773 (McKinney Supp. 1979). *See also* Northern Pac. Ry. v. Northern REO Co., 259 N.W. 95, 97 (N.D. 1935).

94. Socialistic Coop. Pub. Ass'n v. Kuhn, 164 N.Y. 473, 58 N.E. 649 (1900). *But see* Vail v. Quinlan, 406 F. Supp. 951, 960 (S.D.N.Y. 1976) ($250 compensatory fine against indigent judgment debtor for failing to appear at debtor's exam is "punitive"), *rev'd sub nom.* Judice v. Vail, 430 U.S. 327 (1977).

seems more nominal than compensatory.[95] Nominal damages in a compensatory contempt action would appear to confess judicial impotence to remedy the injunction's violation.[96] A minimum statutory award for compensatory contempt is wise, but $250 is too minimal to be meaningful.

Under the model proposed in this article, compensatory contempt is not limited to the plaintiff's "actual loss." Measurement by the contemnor's gain, the multiplication of actual damages, and statutory minimum awards may all advance the substantive standard that the contemnor breached. Each may also reflect the inadequacy prerequisite. Punitive damages, however, raise more complicated problems.

c. Punitive Damages

Punitive damages are granted to create an incentive to pursue wrongdoers, to deter violations of legal standards, to punish wrongdoers, and to set an example to the public.[97] A decision not to include punitive damages in a compensatory contempt award grows out of the standard formulation: compensatory contempt repays the plaintiff for actual losses caused by the contemnor's breach. The difference between a criminal contempt fine and a compensatory contempt award is that in the former the plaintiff's loss sets the bounds of the compensatory contempt award. If punishment is in order, judges should prevent windfalls to plaintiffs by employing criminal contempt.[98]

A decision to include punitive damages, however, is both more complex and more persuasive. Courts should reject categorical approaches that treat compensatory contempt as a hermetically sealed category. One commentator has demonstrated the futility of asserting that punitive damages are available under one legal theory but not under another.[99] Recovery of punitive damages should hinge on the wrongdoer's conduct and enlightened social policy, rather than on the victim's choice of legal theory or form of action. The shibboleth of actual loss to measure compensatory contempt has been abandoned, the courts often confer the contemnor's gain on the plaintiff. Judges should follow the remedial structure of the substantive theory underlying the injunction. If punitive damages are available in a separate action for breach of the legal duty apart from the injunction, for example, the judge should not force the plaintiff to file a second action for dam-

95. *But see* Carey v. Piphus, 435 U.S. 247 (1978) (one dollar nominal award).

96. Schubach v. Zoning Bd. of Adjustment, 308 A.2d 595 (Pa. 1973).

97. D. DOBBS, *supra* note 6, § 3.9, at 205; Mellor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 641 (1980).

98. Moskovitz, *Contempt of Injunctions, Civil and Criminal*, 43 COLUM. L. REV. 780, 787 (1943).

99. Sullivan, *Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change*, 61 MINN. L. REV. 207 (1977).

ages.[100] This strengthens the legal duty by authorizing punitive damages in compensatory contempt on the same terms as in direct action for violation of a legal duty.

The fact that compensatory contempt is a remedy of the equity courts, moreover, should not bar punitive damages when the facts and circumstances otherwise merit. The Alabama Supreme Court recently upheld punitive damages in compensatory contempt under its ancillary proceeding which makes a jury possible.[101] The notion that equity courts may issue only equitable relief and hence only reimbursement is fading quickly. An emerging rule holds that punitive damages may be imposed in equity as well as in law.[102] In less serious violations, moreover, equity judges may now punish injunction violators with criminal contempt, without a jury.[103] The availability of punitive damages will not radically alter judicial power or procedure. Numerous contempt opinions illustrate the observation that compensatory contempt adjudications which create additional incentives to obey injunctions may often be salutary. A firm named Golden Rule, for example, had been held in contempt eighteen times before it destroyed records that the plaintiff could have utilized to assess damages in round nineteen.[104] Punitive damages for selected compensatory contempt adjudications may civilize refractory wrongdoers. If the amount necessary to deter exceeds the victim's damages, or if damages are not enough to deter, courts should consider either public enforcement or the imposition of additional costs.[105] In this context, public enforcement may mean criminal contempt. A punitive award, however, admonishes, punishes, and deters with the same force as a criminal contempt fine.[106]

Punitive damages for compensatory contempt also advance the policies of the inadequacy prerequisite in the same way that payment of the criminal fine to the plaintiff does. Both fill the gap between the plaintiff's measurable damages and his legally recognized impairment. Punitive damages ameliorate otherwise uncompensated losses by proving a money substitute for the immeasurable impairment that caused the judge to enjoin initially.[107] The award of punitive damages, conse-

100. *See In re* Barney's Boats of Chicago, 616 F.2d 164 (5th Cir. 1980) (separate tort action for punitive damages).

101. Moody v. State *ex rel.* Payne, 355 So. 2d 1116 (Ala.), *cert. denied*, 439 U.S. 910 (1978). The court had previously approved punitive damages "under the usual rules." Lightsey v. Kensington Mortgage & Fin. Co., 294 Ala. 281, 288, 315 So. 2d 431, 437 (1975).

102. *See* D. DOBBS, *supra* note 6, § 3.9, at 211.

103. *See id.* § 2.9, at 95.

104. Sunbeam Corp. v. Golden Rule Appliance Co., 252 F.2d 467, 473 (2d Cir. 1958) (Lumbard, J., dissenting). *See also* Moody v. State *ex rel.* Payne, 355 So. 2d 1116 (Ala.), *cert. denied*, 439 U.S. 910 (1978) (repeated violations).

105. R. POSNER, *supra* note 44, at § 7.2.

106. *See* Note, *Injunction Negotiations: An Economic, Moral and Legal Analysis*, 27 STAN. L. REV. 1563, 1592-93 (1975).

107. Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 643 (1980).

quently, promotes the inadequacy prerequisite. Because punitive damages are, in this setting, designed to compensate the plaintiff, the award cannot be viewed as a pernicious and illegitimate windfall to the plaintiff.

One cannot, however, equate a contemnor's misconduct and mental state, which led to punitive damages, with a plaintiff's immeasurable impairment, which led to the injunction. Punitive damages are therefore an inaccurate and incomplete way to vindicate the policies of the inadequacy prerequisite.

As an alternative method of achieving the policies underlying the inadequacy prerequisite, one can look to the law of criminal contempt. Although punitive damages cannot be equated with criminal punishment,[108] in the spectrum of society's remedies, punitive damages and criminal fines perform similar functions. They transfer assets from contemnors and defendants to victims and governments. What the wrongdoer loses, someone else gains. Much antisocial conduct is subject to both criminal and civil sanctions. Punitive damages for compensatory contempt encourage private enforcement[109] and victims recover damages in civil actions for conduct that the state may seek to punish. Thus, instead of imposing criminal fines, courts could allow plaintiffs to recover punitive damages in compensatory contempt.

Judges may punish injunction violators for criminal contempt. Prosecutorial discretion and enhanced procedural protection often insulate criminal contemnors. Because the procedural protections of criminal contempt are not available in compensatory contempt, however, does not mean that punitive damages should be unavailable when

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108. Moody v. State *ex rel.* Payne, 355 So. 2d 1116, 1120 (Ala.), *cert. denied*, 439 U.S. 910 (1978). In criminal contempt, the judge initiates a separate action for criminal contempt relegating the plaintiff to a complaining witness. O. FISS, THE CIVIL RIGHTS INJUNCTION 19-20 (1978). The victim sues for punitive damages and a plaintiff commences compensatory contempt as part of the injunction action. In contrast to juryless compensatory contempt established by a civil standard of proof, criminal contempt is governed by criminal procedure; it includes proof beyond a reasonable doubt and perhaps a jury. Criminal contempt's protections rest on the premise that incorrect criminal convictions are more serious than erroneous acquittals, because imprisoning a defendant deprives society of the prisoner's enterprise, as well as depriving the prisoner of liberty. R. POSNER, *supra* note 44, § 21.3.

Legislatures choose criminal sanctions for serious antisocial conduct. Conduct labeled criminal is hard to detect, and the increased sanction reflects the infrequency of apprehension. Moreover, criminals often dissipate their ill-gotten gains promptly, and they are usually unable to indemnify their victims. Criminal conduct, moreover, often threatens the victim's life or limb, causing losses that are noncompensable. Finally, criminals more often commit their depredations against strangers. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 375 n.76 (1978).

Typical breaches of injunctions fit almost none of these criteria for identifying hard core crimes. The plaintiff knows the contemnor at least well enough to have sued to enjoin. Courts may enjoin crimes but usually not violent crimes, particularly those commited against strangers. Judges apparently conclude that the universal prohibitions of the criminal code, together with the stiffer penalties, suffice to deter. Moir v. Moir, 182 Iowa 370, 165 N.W. 1001 (1918). Plaintiffs who were alert and litigious enough to find the courthouse once may be counted on to enforce injunctions. The risk of being deprived of assets discourages wrongdoing; the recipient of the assets is irrelevant.

109. D. DOBBS, *supra* note 6, § 3.9, at 221; R. POSNER, *supra* note 44, §§ 6.12, 22.1 & 22.2.

adopting compensatory contempt as a remedy. Except for the absence of a jury, the procedural protections in compensatory contempt are the same as those in a civil action seeking punitive damages. The same judge who would grant the punitive damages, moreover, exercises prosecutorial discretion to commence criminal contempt.

Compensatory contempt is strict liability in the sense that a judge cannot exonerate the contemnor merely because he breached the injunction with a blameless state of mind. Criminal contempt, by contrast, includes an intent element called wantonness or wilfulness.[110] Aggravated misconduct animated by a malicious mental state, moreover, is normally a prerequisite for punitive damages.[111] If courts choose to follow the substantive standard and grant punitive damages in compensatory contempt, they should accommodate punitive damages to criminal contempt fines by equating punitive damage malice with criminal contempt wilfulness, concluding that punitive damages punish and deter as much as criminal contempt fines, replacing many criminal contempt fines with punitive damages, and forbidding criminal contempt fines after punitive compensatory proceedings.[112] Courts should retain the option of regulating serious violations with criminal jail sentences. They might also couple punitive damages with jail in exacerbated contempt situations.

Courts should add punitive damages to compensatory contempt awards when merited by the facts and authorized by the substantive standard embodied in the injunction. Punitive compensatory contempt advances the underlying substantive standard. Punitive damages also supply an inadequate but nonetheless remedial equivalent for some of the impalpable, subjective impairment that led the court to originally enjoin. To this extent, the award of punitive damages reflects the inadequacy prerequisite. Finally, punitive damages replace criminal contempt fines with private enforcement.

3. Distinguishing Criminal from Compensatory Contempt: Eradicating the Actual Loss Rule

As demonstrated, courts should not limit compensatory contempt awards to actual losses supported by evidence. A broader view of damages can be considered in civil contempt and nonetheless comport with the policy the Supreme Court announced in *Gompers v. Bucks Stove & Range Co.*[113] In *Gompers*, the court differentiated between criminal and civil contempt. Contempt designed solely to punish the violation of a court order is considered criminal contempt and deserves all the

110. Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 261-65 (1971).
111. D. DOBBS, *supra* note 6, § 3.9, at 205.
112. Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 658, 664 (1980).
113. 221 U.S. 418 (1911).

procedural safeguards accorded a criminal proceeding. On the other hand, contempt that is coercive or remedial in nature is civil contempt.[114]

In the heat of conflict, judges and litigants may lose sight of contempt's compensatory role and concentrate on punishment. The rule that actual damages be proved prevents the judge from punishing the contemnor under the guise of compensating the plaintiff and, thus, protects the contemnor's right to criminal procedure before criminal punishment.[115] The plaintiff cannot set up or entrap the contemnor and impose a "criminal" penalty without criminal procedure,[116] particularly when the penalty represents a windfall to the plaintiff.

If an ostensible compensatory award actually punishes, then it is really a criminal fine. Under the proved actual damage rule, the appellate court has several alternatives. It may reverse the criminal fine either because it followed civil procedure[117] or because the plaintiff failed to adduce evidence of damage to support a compensatory award.[118] Finally, it may reduce the award to the amount the plaintiff proved.[119]

The proved actual damages rule, however, has not cured all the maladies that result from confusing the purposes of criminal contempt with the purposes of compensatory contempt. Courts have evaded the actual damage limitation by fining the contemnor and awarding a fraction of the fine to the private plaintiff.[120] On the apparent pretext of punishing the contemnor, courts also have approved estimated "compensatory" damages in round figures.[121] Other courts affirm severely inadequate round-figure contempt awards either because they are less than the plaintiffs' actual losses[122] or on the incorrect theory that the amount of compensatory contempt is within the trial judge's discretion.[123] Clearly defined and intelligible distinctions that serve proper policies would end this confusion and injustice.[124]

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114. *See generally* D. DOBBS, *supra* note 6, § 2.9, at 97-98 n.19.

115. Christensen Eng'r Co. v. Westinghouse Air Brake Co., 135 F. 774, 782 (2d Cir. 1905); Vail v. Quinlan, 406 F. Supp. 951, 960 (S.D.N.Y. 1976), *rev'd sub nom.* Judice v. Vail, 430 U.S. 327 (1977); Campbell v. Motion Picture Mach. Operators, 151 Minn. 238, 186 N.W. 787 (1922).

116. Judelsohn v. Black, 64 F.2d 166 (2d Cir. 1933).

117. Clark v. Boynton, 362 F.2d 992, 998 (5th Cir. 1966).

118. Smith v. Indiana State Bd. of Health, 158 Ind. App. 445, 459-60, 303 N.E.2d 50, 57-58 (1973).

119. Lewis v. Lorenz, 144 Colo. 23, 354 P.2d 1008 (1960).

120. *In re* Christensen Eng'r Co., 194 U.S. 458 (1904); Christensen Eng'r Co. v. Westinghouse Air Brake Co., 135 F. 774, 781 (2d Cir. 1905); Merchants Stock & Grain Co. v. Board of Trade of Chicago, 201 F. 20, 30 (8th Cir. 1912).

121. *See, e.g.*, Department of Pub. Health v. Cumberland Cattle Co., 361 Mass. 817, 832, 282 N.E.2d 895, 905 (1972); Godard v. Babson-Dow Mfg. Co., 319 Mass. 345, 349, 65 N.E.2d 555, 558 (1946).

122. Crane v. Gas Screw Happy Pappy, 367 F.2d 771, 775 (7th Cir. 1966); Chadwick v. Alleshouse, 250 Ind. 348, 356-57, 233 N.E.2d 162, 166-67 (1968).

123. Long Island R.R. Co. v. Brotherhood of R.R. Trainmen, 298 F. Supp. 1347, 1350 (E.D.N.Y. 1969); Folk v. Wallace Bus. Forms, Inc., 394 F.2d 240, 244 (4th Cir. 1968)..

124. *See, e.g.*, Thomas v. Woolen, 255 Ind. 612, 615-16, 266 N.E.2d 20, 22 (1971); Duemling v. Fort Wayne Community Concerts, 243 Ind. 521, 524-25 188 N.E.2d 274, 276 (1963). *See also*

The proved actual damage rule also prevents windfalls for plaintiffs, created when courts confuse coercive and compensatory contempt. Judges often appear to lose sight of compensatory contempt,[125] viewing civil contempt only as coercive to assure that the contemnor obeys in the future. This view, of course, leads to other problems. Judges, as already discussed, may remit to separate damage actions victims injured when the defendant breaches the injunctions.[126] Both coercive and compensatory contempt contemplate the payment of money. The judge may be tempted to overcompensate the plaintiff by utilizing an ostensibly compensatory award to coerce the defendant. He may either order that a coercive daily fine on the contemnor be paid to the plaintiff or be satisfied with liberal proof of compensatory damages.[127] Appellate courts sometimes reverse these "compensatory" awards because they are not based on proved actual damages.[128]

While growing out of significant policies, compensatory contempt's rule that actual damages be proved fails to work uniformly and satisfactorily. The present rule, moreover, often retards the policies of the substantive theory on which the injunction is based. More diffuse yet more precise measurement rules will better serve the policies of the substantive law. The policy of preventing criminal punishment without criminal procedure will normally be furthered by requiring satisfactory proof of compensable loss under the remedial formula appropriate to the plaintiff's substantive theory.

B. Vindicating the Inadequacy Prerequisite

Courts select and measure remedies to carry out policies. Remedial devices seldom have a single purpose or function. One part of compensatory contempt advances the substantive purposes of the underlying cause of action. Although advancement of the substantive purposes may strengthen, or at least not retard, the policies of the inadequacy prerequisite, other devices are particularly designed to advance the policies of the inadequacy prerequisite.

General Elec. Co. v. Waldman, 159 F. Supp. 576, 580-81 (W.D. Pa. 1958) (court approved consent decree allowing coercive-liquidated figure to plaintiff on violation, where amount was not excessive or unreasonable).

125. Northside Realty Assoc., Inc., v. United States, 605 F.2d 1348 (5th Cir. 1979). For example, the U.S. Court of Appeals for the Fifth Circuit recently said that a compensatory

> award would have at best a tangential effect in coercing future compliance with the Court's decree. The sort of relief sought by the government here, monetary damages for individual housing discriminatees, is a purely legal remedy . . . which compensates for past wrongs. The enforcement purpose of a contempt order is much better served by ordering, as was done here, the payment of a daily fine in the event of noncompliance with the Court's order.

Id. at 1356-57.

126. Northside Realty Assoc., Inc. v. United States, 605 F.2d 1348, 1356-57 (5th Cir. 1979); Pacific Gamble Robinson Co. v. Minneapolis & St. Louis Ry. Co., 92 F. Supp. 352 (D. Minn. 1950); Odom v. Langston, 213 S.W.2d 948 (Mo. 1948).

127. Thomas v. Woolen, 255 Ind. 612, 615-16, 266 N.E.2d 20, 22 (1971); Duemling v. Fort Wayne Community Concerts, 243 Ind. 521, 524-25, 188 N.E.2d 274, 276 (1963).

128. Brown v. Brown, 183 Colo. 356, 516 P.2d 1129 (1973).

1. Attorney's Fees

Contempt orders—compensatory, coercive and sometimes criminal—normally add the expense of enforcing and defending the injunction to the amount of the fine, including costs and fees for the plaintiff's attorney.[129] This contrasts with the usual American rule that, absent a contract or statute, courts will not allow prevailing litigants to recover attorney's fees from losers.[130] The cost of enforcing an injunction with a contempt order is a recognized exception to the general rule.[131] Even states that force plaintiffs to sue in separate lawsuits or ancillary proceedings authorize plaintiffs to recover the costs of enforcement.[132]

Several valid reasons support augmented contempt awards. Damages generally omit transaction costs. Thus, a winning plaintiff nets less than out-of-pocket expenses, unless the theory comprehends pain and suffering or another attorney's fee component. If the defendant wins, each litigant loses the amount their attorney received. Because of the transaction costs received by lawyers, litigation is worse than a zero-sum game. Allowing the plaintiff to recover from the contemnor the cost of enforcing the injunction removes some of plaintiff's disincentive. Considering that the contemnor violated a clearly stated legal duty to plaintiff, moreover, the award of attorney's fees is fair. Absent an injunction, judges award fees to the winner when the loser obdurately or oppressively refuses to honor a clear legal duty.[133] Attorney's fees in compensatory contempt actions resemble the obduracy exception to the usual rule.[134]

Courts issue an injunction either when money damages for disobeying the substantive standard are difficult or impossible to compute or when the plaintiff's interest is so important that money damages can-

129. *See, e.g.*, Northside Realty Assoc., Inc. v. United States, 605 F.2d 1348, 1356 (5th Cir. 1979); Vuitton et Fils S.A. v. Carousel Handbags, 592 F.2d 126, 130 (2d Cir. 1979); David v. Hooker, Ltd., 560 F.2d 412, 421 (9th Cir. 1977); Shakman v. Democratic Organization of Cook County, 533 F.2d 344, 351 (7th Cir. 1976); Norman Bridge Drug Co. v. Banner, 529 F.2d 822, 827 (5th Cir. 1976); National Research Bureau v. Kucker, 481 F. Supp. 612, 615 (S.D.N.Y. 1979); Frankel v. Moskovitz, 503 S.W.2d 428, 433-34 (Mo. App. 1973). The plaintiff normally will not receive attorney's fees for criminal contempt. Shapiro v. Shapiro, 115 Colo. 501, 175 P.2d 387 (1946). If the judge appoints the plaintiff's attorney to prosecute a criminal contempt charge, the plaintiff will recover only the cost of prosecuting the civil contempt. The judge, moreover, will refuse to allow the plaintiff to recover for prosecuting the criminal contempt. Backo v. Local 281, 438 F.2d 176, 183 n.5 (2d Cir. 1970), *cert. denied*, 404 U.S. 858 (1971); Moody v. State *ex rel.* Payne, 355 So. 2d 1116, 1119 (Ala.), *cert. denied*, 439 U.S. 910 (1978). *Cf.* 47th & State Currency Exch., Inc. v. B. Coleman Corp., 56 Ill. App. 3d 229, 235, 371 N.E.2d 294, 299 (1978); *but see* Landman v. Royster, 354 F. Supp. 1292, 1301 (E.D. Va. 1973) (separate motion for attorney's fees); Jaikins v. Jaikins, 12 Mich. App. 115, 122, 162 N.W.2d 325, 329-30 (1968).

130. Alyeska Pipeline Service Co. v. Wilderness Soc'y, 4421 U.S. 240, 257 (1975).

131. Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 428 (1923). *Accord*, Hutto v. Finney, 437 U.S. 678, 689 n.14 (1978) (dicta).

132. Moody v. State *ex rel.* Payne, 355 So. 2d 1116, 1119 (Ala.), *cert. denied*, 439 U.S. 710 (1978); Kasparek v. May, 178 Neb. 425, 427, 133 N.W.2d 614, 617 (1965).

133. F.D. Rich Co. v. United States, 417 U.S. 116, 129 (1974); Vaughn v. Atkinson, 369 U.S. 527, 530-31 (1962).

134. Hutto v. Finney, 437 U.S. 678, 691 (1978).

not suffice for the harm that would result from the defendant's interference. After the contemnor violates an injunction, handing the proprietor only the contemnor's profit or the proprietor's loss frustrates the decision to enjoin. Authorizing successful plaintiffs to recover the costs of enforcement encourages implementation of the legal standard. The cost to enforce may be thought to supply a rough equivalent to the subjective or impalpable impairment that initially led the court to enjoin. Adding the cost of enforcment to a compensatory contempt award, moreover, makes enforcement of the injunction nearly costless to the plaintiff and makes the breach more costly to the contemnor than the victim's loss. Further, the order to reimburse the successful plaintiff for the cost of obtaining a damage verdict may discourage the contemnor from flouting the legal standard.[135] Taking the cost of enforcement from the contemnor and paying it to the plaintiff advances the policies underlying both the inadequacy prerequisite and the decision to enjoin. Because of the policy underlying the decision to allot the cost of enforcement to the plaintiff, symmetry is unnecessary. Consequently, perceptive courts will deny defense costs to contemnors exonerated of contempt.[136]

The attorney's fee award is also sound economic policy. Compensatory contempt orders often arise from injunctions protecting statutory monopoly interests, such as copyrights, patents, and trademarks, that are designed to subsidize innovative activity. The proprietor accepts consideration, in return for a waiver of the monopoly.[137] The bargaining process leads the proprietor to exchange the opportunity costs of the monopoly for the potential licensee's money. The process maximizes the asset's value by placing the right to exercise the monopoly in the hands of licensees able to exploit it most efficiently. It also utilizes the competitive process to assess and recognize the innovation's value.

The contemnor causes this bargaining process to go awry, first by infringing on the protected interest and triggering an injunction and, second, by breaching the injunction. This substitutes two expensive judicial transactions, the injunction and the contempt proceedings, for inexpensive private bargaining. By authorizing injunctions in the statutes,[138] Congress intended to prevent firms from infringing on the statutory monopolies and then merely paying damages to the proprietors for what amounted, in effect, to a payment for the right to exploit a legally-protected right reserved exclusively to the plaintiff. Simply compelling the contemnor to satisfy the proprietor's loss will not en-

135. *Id.*

136. Hensley v. Board of Educ. of Unified School Dist. No. 443, 210 Kan. 858, 864, 504 P.2d 184, 189-90 (1972); Glo-Klen Co., Inc. v. Far West Chem. Prod. Co., 53 Wash. 2d 9, 12, 330 P.2d 180, 182 (Wash. 1958).

137. Baxter, *Legal Restrictions on Exploitation of the Patent Monopoly: An Economic Analysis*, 76 YALE L.J. 267, 276 (1966).

138. 15 U.S.C. § 1116 (1976); 17 U.S.C. § 502 (Supp. II 1978); 35 U.S.C. § 283 (1976).

courage the firm to substitute bargaining for coerced judicial transactions. But forcing the contemnor to pay most of the expenses of the second judicial transaction may inhibit disobedience and encourage the contemnor to come to terms with the proprietor in a private market transaction. To encourage private bargaining, the courts calculate contempt damages by adding the additional expense of the coerced transaction to the victim's damages.[139]

Appellate courts often hold that trial courts have discretion in compensatory contempt proceedings to grant attorney's fees[140] and that the contemnor's wilfulness in violating the injunction is one factor that permits attorneys' fees awards.[141] Because the decision to grant fees is discretionary, the judge may deny them for poor reasons or for no reason at all. The cost of enforcement, including attorney's fees, should be a standard component of compensatory awards.[142] If enforcement costs are to fulfill the twin functions of making injunction enforcement inexpensive and advancing the inadequacy prerequisite, then judges should grant enforcement costs when the plaintiff shows that the contemnor breached the injunction. When the contemnor disobeys an injunction, judges should be stripped of the discretion to refuse to compensate the victim for recognized compensatory contempt damages.[143]

Similarly, some courts refuse to award enforcement costs or attorney's fees in the absence of a demonstration of the defendants' wilfulness. This refusal frustrates the inadequacy prerequisite. Courts in compensatory contempt proceedings appear to have transferred the wilfulness requirement either from the law of criminal contempt or from the obduracy exception to the general rule barring attorneys' fees. But compensatory contempt includes no mental element. Upon breach of the injunction, the contemnor should indemnify all of the plaintiff's recognized losses. The award should embrace the expenses of enforcing the injunction. The cost to the victim of investigating and prosecuting the violation of injunctions does not vary in relation to whether the contemnor's conduct was serene, negligent, or wilful. To offset the uncompensable impairment that led the judge to enjoin, the mental state of the violator should not be dispositive of the amount of compensation

139. *Cf.* R. POSNER, *supra* note 44, § 7.2.

140. Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 428 (1923); Siebring v. Hansen, 346 F.2d 474, 480-81 (8th Cir. 1965); *In re* Federal Facilities Realty Trust, 227 F.2d 697 (7th Cir. 1955); Berman v. Berman, 232 Ga. 342, 206 S.E.2d 447, 449 (1974).

141. *See, e.g.*, Alyeska Pipeline Co. v. Wilderness Soc'y, 421 U.S. 240, 258 (1975) (dicta); Fleischman Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967) (dicta); Vuitton et Fils S.A. Carousel Handbags, 592 F.2d 126, 130 (2d Cir. 1979); *In re* Federal Facilities Realty Trust, 227 F.2d 657 (7th Cir. 1955).

142. Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 428 (1923); World's Finest Chocolate, Inc. v. World Candies, Inc., 409 F. Supp. 840, 845-46 (N.D. Ill. 1976).

143. Vuitton et Fils S.A. v. Carousel Handbags, 592 F.2d 126, 130 (2d Cir. 1979) (nevertheless referring to attorney fees as hinging on wilfullness); Yanish v. Barber, 232 F.2d 939, 947 (9th Cir. 1956); Parker v. United States, 153 F.2d 66, 70 (1st Cir. 1946).

due.[144]

Many compensatory contempt cases grow out of injunctions that protect copyright and patent interests. Counsel fees are available in separate infringement actions[145] but in infringement actions themselves, courts restrict fees to exceptional or exacerbated instances.[146] If compensatory contempt courts grant fees as part of the cost of enforcing injunctions and vindicating the inadequacy prerequisite, the judge's compensatory contempt inquiry should follow the more lenient compensatory contempt standard and reject the strict standard of the underlying substantive remedy.[147] This article has argued that the "compensatory" part of compensatory contempt awards should be measured by the substantive standard embodied in the injunction. The "compensatory" part of the award should serve that substantive standard. The costs of enforcement should promote the inadequacy prerequisite, a distinct policy. Courts exempt compensatory contempt from the general rule that bars recovery of attorney's fees. For the same reasons, they should exempt the costs of enforcing compensatory contempt from the statutory and judicial standards of specialized substantive areas.

Placing the cost to enforce on the wrongdoer fosters the idea that the plaintiff should enjoy the substantive right in dispute, instead of a mere money substitute. Courts issue injunctions to protect impalable interests too important to be valued in money or too speculative to ascertain. A contemnor's violation of an injunction injures the plaintiff in a way the judge has already said cannot or should not be measured in money. Consequently, courts should automatically grant enforcement costs in all compensatory contempt cases. To advance the inadequacy prerequisite, a defendant who disobeys an injunction should reimburse the plaintiff for the cost of policing it even though the plaintiff cannot prove any compensable damage other than the cost of enforcement.[148]

144. Cook v. Ochsner Foundation Hosp., 559 F.2d 270, 272 (5th Cir. 1977). *But cf.* David v. Hooker, Ltd., 560 F.2d 412, 420 (9th Cir. 1977) (wilfullness not relevant to violation but bears on sanction); Thompson v. Johnson, 410 F. Supp. 633 (E.D. Pa. 1976) (no violation found; attorney fees nevertheless granted in order to secure compliance). Two decisions which deny attorney fees, apparently because the plaintiff unreasonably pressed contempt, are *In re* Federal Facilities Realty Trust, 227 F.2d 657 (7th Cir. 1955) and Freeman v. Premier Mach. Co., 25 F. Supp. 927 (D. Mass. 1938).

145. 17 U.S.C. § 505 (Supp. II 1978); 35 U.S.C. § 285 (1976).

146. Park-In-Theatres, v. Perkins, 190 F.2d 137 (9th Cir. 1951).

147. *See, e.g.*, Northside Realty Assoc., Inc. v. United States, 605 F.2d 1348, 1356 n.23 (5th Cir. 1979); W.E. Bassett Co. v. Revlon, Inc., 435 F.2d 656, 665 (2d Cir. 1970); Dow Chem. Co. v. Chemical Cleaning, Inc., 434 F.2d 1212, 1215 (5th Cir. 1970). *But see* Ransburg Electo-Coating Corp. v. Procter Elec. Co., 242 F. Supp. 28, 39 (D. Md. 1965).

148. *See, e.g.*, Allied Materials Corp. v. Superior Prods. Co., 620 F.2d 224 (10th Cir. 1980); Shakman v. Democratic Organization of Cook County, 533 F.2d 344, 351 (7th Cir. 1976); Wadsworth Elec. Mfg. Co. v. Westinghouse Elec. Co., 71 F.2d 850 (6th Cir. 1934); Powell v. Ward, 487 F. Supp. 917, 936 (S.D.N.Y. 1980); *In re* American Assoc'd Sys., Inc., 373 F. Supp. 977, 979-90 (E.D. Ky. 1974); United Factory Outlet, Inc. v. Jay's Stores, Inc., 361 Mass. 35, 278 N.E.2d 716 (1972); R.E. Harrington, Inc. v. Frick, 446 S.W.2d 845 (Mo. App. 1969); Arvin, Inc. v. Sony Corp.

To match the remedy with the reason for enjoining, the plaintiff should be able to enforce an injunction without expense, and the contemnor should pay more than the victim would recover in a separate damage action. In pursuit of this goal, one judge went so far as to promote compliance by charging the contemnor with the plaintiff's attorney's fees, even though he found that the contemnor had not technically breached the injunction.[149]

The older view was that a successful contempt plaintiff recovers reasonable attorney's fees, evaluated in light of judicial expertise about the value of legal services. The judge determined the amount of fees without taking actual evidence.[150] In the last decade, however, courts have developed more specific mechanisms for granting and measuring counsel fees, particularly in bankruptcy and civil rights litigation. They have also exercised greater pragmatism, insisting that plaintiffs prove the amount of fees.[151] Increasingly, compensatory contempt courts are adopting this approach.[152] The requirement of factual support for counsel fees advances the purpose of compensatory contempt more than judicial estimation of those fees because it inhibits parsimonious awards[153] that discourage plaintiffs from enforcing injunctions.

2. *Preaward Interest*

Preaward interest may be viewed as part of the cost of enforcing an injunction. Augmenting the compensation award by the amount of the preaward interest would therefore further the policies underlying the inadequacy prerequisite. Although little judicial or scholarly attention has been granted this question, several state and federal court opinions in Massachusetts infer that a compensatory contempt award should include interest granted from the time of breach.[154]

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of America, 215 Va. 704, 213 S.E.2d 753 (1975) (attorney fees without nominal damages where contemnor sold property in violation of Fair Trade injunction).

149. Thompson v. Johnson, 410 F. Supp. 633 (E.D. Pa. 1976) (dicta).

150. Norstrom v. Wahl, 41 F.2d 910, 914 (7th Cir. 1930); Campbell v. Motion Picture Mach. Operators, 151 Minn. 238, 242, 186 N.W. 787, 789 (1922); Moskovitz, *Contempt of Injunctions, Civil and Criminal*, 43 COLUM. L. REV. 780, 807 (1943).

151. *See, e.g.*, Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974).

152. Cook v. Ochsner Foundation Hosp., 559 F.2d 270, 273 (5th Cir. 1977); Preston v. Mandeville, 451 F. Supp. 617 (S.D. Ala. 1978); Andre Matenciot, Inc. v. David & Dash, Inc., 422 F. Supp. 1199, 1211-12 (S.D.N.Y. 1976).

153. Dow Chem. Co. v. Chemical Cleaning, Inc., 434 F.2d 1212 (5th Cir. 1970); Nelson v. Steiner, 279 F.2d 944 (7th Cir. 1960); Coca-Cola v. Bisignano, 343 F. Supp. 263 (S.D. Iowa 1972); Bonanza Int'l Inc. v. Corceller, 343 F. Supp. 14, 17 (E.D. La. 1972).

154. Parker v. United States, 135 F.2d 54, 59 (1st Cir. 1943); Parker v. United States, 126 F.2d 370, 380 (1st Cir. 1942) (aggregate amount due the plaintiff from contemnor, with interest); Coyne Indus. Laundry v. Gould, 359 Mass. 269, 278-79, 268 N.E.2d 848, 854 (1971); Lyon v. Bloomfield, 355 Mass. 738, 247 N.E.2d 555, 558 (1969).

In other contexts, courts are antagonistic to preaward interests. In claims for personal injury or lost profits, courts regularly deny prejudgment interest because of the rule that interest computation begins when the clerk enters the judgments, unless the amount of interest could be determined with reasonable certainty before judgment. D. DOBBS, *supra* note 6, § 3.5, at 165. Courts

Strong policy arguments support a grant of preaward interest in compensatory contempt proceedings. Policies underlying the inadequacy prerequisite, for example, would be furthered by encouraging private bargaining, placing the entire cost of the coerced nonmarket transaction on the contemnor, making enforcement of injunctions costless to plaintiffs and augmenting compensation to supply a rough equivalent for the intangible interests that originally led the judge to enjoin.

The argument for preaward interest in compensatory contempt is persuasive for standard remedial reasons and, thus, would further the policies of the underlying cause of action. In violating the injunction, the contemnor violated a clear legal duty owed to the plaintiff. If the plaintiff recovers damages for breaches up to trial, and an injunction against future breaches, then compensatory contempt damages are ascertainable and virtually undisputed. Courts, moreover, often add prejudgment interest to restitutionary claims.[155] The plaintiff might argue that the injunction created a fiduciary duty owed to him by the contemnor, and upon breach the contemnor must account with interest.[156] By threatening in the injunction order to add prejudgment interest to any compensatory contempt award, judges could also incorporate the preaward interest into the breaching party's calculus of the incidental costs of a breach. Preaward interest would strengthen both the substantive standard and the inadequacy prerequisite.

V. COLLECTING COMPENSATORY CONTEMPT

Once the trier of fact determines that compensatory contempt is due and sets the amount, the plaintiff must collect the award. The plaintiff, as a contempt creditor with an equitable decree for money, may employ any of the techniques available to a judgment creditor to collect a legal judgment.[157] Thus, contempt creditors have used execution as their principal collection mechanism.[158] Coercive collection often becomes imperative because the debtor transfers property to others or is simply recalcitrant. In addition to the same proceedings available to a judgment creditor, a contempt creditor enjoys the luxury of additional collection techniques, for the judge embodies a compen-

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also routinely deny prejudgment interest on patent infringement judgments, *see, e.g.*, Swan Carburetor Co. v. Nash Motors Co., 133 F.2d 562, 567 (4th Cir. 1943), except on terms similar to punitive damages, when the infringer evidences bad faith or wilfulness. *See, e.g.*, Samson-United Corp. v. F.A. Smith Mfg. Co., 68 U.S.P.Q. 266 (W.D.N.Y. 1946).

155. D. DOBBS, *supra* note 6, § 3.5, at 169-70.

156. *Cf.* Leman v. Krentler-Arnold Hinge Last Co., 284 U.S. 448, 456 (1932) (theory of lost profit recovery).

157. *See, e.g.*, *In re* Meggett, 105 Wisc. 291 (1900); VA. CODE § 8.01-426 (1977); Cook, *The Powers of Courts of Equity*, 15 COLUM. L. REV. 106, 116 (1915).

158. Winner Corp. v. H.A. Caesar & Co., Inc., 511 F.2d 1010, 1013 (6th Cir. 1975); Hadnott v. Amos, 325 F. Supp. 777, 779 (M.D. Ala. 1971); Baltz v. Walgreen Co., 198 F. Supp. 22, 26-27 (W.D. Tenn 1961).

satory award in a personal order instead of an impersonal judgment. The status of the creditor as a contempt creditor, rather than a mere judgment creditor, however, does not justify these additional techniques.

Legal judgment creditors may immure debtors to discover and collect assets. Under supplementary proceedings to interrogate debtors and discover assets, if the debtor fails to appear, disdains to answer, or refuses to relinquish property, the judge may order imprisonment for coercive contempt until he complies.[159] But courts generally prefer impersonal execution and garnishment to discovery proceedings enforced with personal orders.[160] A judge using these techniques to collect legal judgments, moreover, would not order a contemnor confined merely because the sheriff returned the execution nulla bona or the contemnor failed to pay the clerk or the plaintiff,[161] as may occur with a compensatory contempt award. A personal order to a debtor to pay a general money judgment enforced by coercive imprisonment is often perceived as imprisonment for debt, which most state constitutions prohibit.[162] Before imprisoning the contemnor, the judge should be certain that the judgment debtor is able to obey an order to appear, answer, or convey, but refuses to do so.[163] In order to use coercive contempt to extract money from a contemnor, the plaintiff must show that the contemnor has the capacity to pay. The judge may only require the contemnor to perform an act he is capable of performing. If the contemnor demurs, the judge, without violating the prohibition, may jail the contemnor until compliance.[164]

A wave of humanitarian reform during the nineteenth century sharply circumscribed the practice of imprisoning civil debtors.[165] Most states passed constitutional prohibitions against debt imprisonment, and many states have banned body execution.[166] Even where

159. *See, e.g.*, VA. CODE § 8.01-508 (1977). *See generally* V. COUNTRYMAN, CASES AND MATERIALS ON DEBTOR AND CREDITOR 106-07 (2d ed. 1974). Santos, *Enforcing Money Judgments Against Personal Property in Virginia*, 21 WM. & MARY L. REV. 731, 768-70 (1980).

160. Dunlop v. Fisher, 406 F. Supp. 760, 761 (D. Colo. 1976); MICH. STAT. ANN. § 27A.1701(5) (1976); N.C. GEN. STAT. § 5-8(2) (1969); 1 G. GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 28 (1940).

161. *See, e.g.*, Union Tool v. Wilson, 259 U.S. 107, 109 (1922); United States v. Onan, 190 F.2d 1, 5 (8th Cir. 1951); Parker v. United States, 126 F.2d 370, 381 (1st Cir. 1942).

162. Kidd v. Virginia Safe Deposit & Trust Corp., 113 Va. 612, 75 S.E. 145 (1912). *See also* Walling v. Crane, 158 F.2d 80, 85 (5th Cir. 1946); D. DOBBS, *supra* note 6, § 2.9, at 98-99.

163. Tudor v. Furebaugh, 364 Ill. 283, 4 N.E.2d 393 (1936); People v. Lamothe, 331 Ill. 351, 163 N.E. 5 (1928).

164. *Ex parte* Ridgley, 261 Mich. 42, 245 N.W. 803 (1932).

165. P. COLEMAN, DEBTORS AND CREDITORS IN AMERICA 25-68 (1974).

166. Neither Maryland nor Virginia have body execution, and the Virginia General Assembly abolished *capias ad responendum*, the surviving vestige of debt imprisonment, when it revised civil procedure in 1977. VA. CODE § 8.01-575 (1977). Note, *Body Attachment and Body Execution: Forgotten But Not Gone*, 17 WM. & MARY L. REV. 543, 551 n.52 (1976). North Carolina, however, still extends the benefits of body execution to judgment debtors, N.C. GEN. STAT. § 1-311 (Supp. 1977).

body execution is still available, creditors may utilize it only for certain debts and against certain types of debtors—for example, fraud feasors and family support debtors.[167] Due process and equal protection concepts, moreover, currently attenuate the creditor's ability to imprison the judgment debtor.[168]

The winds of statutory revision and constitutional limitation, however, have not swept unencumbered into the law of compensatory contempt.[169] Some courts hold the contemnor directly liable to the court, whenever the plaintiff receives his due from the court clerk.[170] Even if the contemnor was ordered to pay the plaintiff directly,[171] the judgment's in personam nature removes compensatory contempt awards from the usual collection process. The compensatory contemnor may be imprisoned until payment of the award,[172] and in several cases compensatory contempt debtors have not only been threatened with imprisonment,[173] but have been actually jailed.[174] Courts have both asserted and exercised the authority to imprison, to collect compensatory contempt, and only then to allow the contemnor to seek release.[175] Judgment creditors, in contrast, are forbidden to imprison without

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167. Note, *Body Attachment and Body Execution: Forgotten But Not Gone*, 17 WM. & MARY L. REV. 543, 551-53 (1976).

168. *Id.*

169. *See, e.g.*, Union Tool Co. v. Wilson, 259 U.S. 107, 109 (1922); Norman Bridge Drug Co. v. Banner, 529 F.2d 822, 828 (5th Cir. 1976).

170. The Minnesota Supreme Court said that coercive confinement to collect compensatory contempt is not the equivalent of imprisonment for debt:

> That a person convicted of contempt, who fails to comply with the judgment imposed therefor, may be coerced to do so by imprisonment without infringing [the constitutional provision forbidding imprisonment for debt], whether the judgment directs the payment of money or the doing of some other act, has been settled too long and too firmly to require further discussion or the citation of authorities.

Campbell v. Motion Pictures Mach. Operators, 151 Minn. 238, 243, 186 N.W. 787, 789 (1922). *See also* Trotcky v. Van Sickle, 227 Ind. 441, 85 N.E.2d 638 (1949); Smith v. Indiana State Bd. of Health, 158 Ind. App. 445, 463, 303 N.E.2d 50, 59 (1973) ("imprisonment in contempt is not imprisonment for debt within the meaning of the Constitution."); White v. Wadhams, 211 Mich. 658, 663, 179 N.W. 245, 247 (1920).

171. Securities Investor Protection Corp. v. Executive Sec. Corp., 433 F. Supp. 470, 472 (S.D.N.Y. 1977); My Laundry Co. v. Schmeling, 129 Wisc. 597, 603, 109 N.W. 540, 543 (1906).

172. *See, e.g.*, Lichtenstein v. Lichtenstein, 425 F.2d 1111 (3d Cir. 1970) (trial court order reversed); Crane v. Gas Screw Happy Pappy, 367 F.2d 771, 772 (7th Cir. 1966); Eustace v. Lynch, 80 F.2d 652 (9th Cir. 1935); Norstrom v. Wahl, 41 F.2d 910, 914 (7th Cir. 1930); Socialistic Coop. Publishing Ass'n v. Kuhn, 164 N.Y. 473, 58 N.E. 649 (1900); Jastram v. McAuslan, 29 R.I. 390, 71 A. 454 (1909); N.D. CENT. CODE § 27-10-04 (1974); OHIO REV. CODE ANN. § 2727.12 (Page 1953); OKLA. STAT. ANN. tit. 12, § 1390 (Supp. 1979-80).

173. Courts have threatened to jail the contemnor for failing to pay either the clerk of the court, Union Tool v. Wilson, 259 U.S. 107, 109 (1922); Parker v. United States, 129 F.2d 374, 375 n.1 (1st Cir. 1942); Trotcky v. Van Sickle, 227 Ind. 441, 448, 85 N.E.2d 638, 641 (1949), or the plaintiff directly, Boylan v. Detrio, 187 F.2d 375, 377-78 (5th Cir. 1951); Norstrom v. Wahl, 41 F.2d 910, 914 (7th Cir. 1930); Chadwick v. Alleshouse, 250 Ind. 348, 357, 233 N.E.2d 162, 167 (1968).

174. United States v. Onan, 190 F.2d 1, 5 (8th Cir. 1951); Hendryz v. Fitzpatrick, 19 F. 810 (C.C.D. Mass. 1884); Vail v. Quinlin, 406 F. Supp. 951, 957 (S.D.N.Y. 1976), *rev'd sub nom.* Judice v. Vail, 430 U.S. 327 (1977); *In re* Mann, 126 F. Supp. 709, 710 (D. Mass. 1954).

175. Trotcky v. Van Sickle, 227 Ind. 441, 449, 85 N.E.2d 638, 641-42 (1949); Smith v. Indiana State Bd. of Health, 158 Ind. App. 445, 463, 303 N.E.2d 50, 59-60 (1973).

employing other devices first. To imprison the debtor, they must convince the judge that the debtor is able to pay, but refuses.[176] Because of this greater coercion, contempt debtors are more likely to sell property statutorily exempted from execution,[177] thus defeating the statute's policy of saving a minimum cushion for debtors, and protecting debtors' families.[178]

Contempt debtors, however, may not be jailed indefinitely to extract money which they do not possess.[179] The orders often commit the contemnor only "until the [judge's] further order."[180] Inability to comply, moreover, is a defense to contempt,[181] and the contemnor may be released upon demonstrating an inability to pay.[182] One court even freed contemnors who demonstrated "that confinement would cause undue hardship."[183] By declaring bankruptcy, moreover, the contemnor may also defeat collection, discharge the debt, and decamp jail.[184] Finally, the more humane modern view is that coercive imprisonment to collect a general money sum for compensatory contempt violates the prohibition against imprisonment for civil debt.[185]

Contemnors should pay awards to compensate plaintiffs and further the policies behind the substantive doctrines and the inadequacy prerequisite. But no cogent reason exists to treat compensatory contemnors more harshly than equity defendants or judgment debtors. The reasoning that led policymakers to ban debt imprisonment and to limit coercive contempt effectuated important substantive policies. The

176. Securities Investor Protection Corp. v. Executive Sec. Corp., 433 F. Supp. 470, 473 (S.D.N.Y. 1977).

177. *See, e.g.*, Vail v. Quinlan, 406 F. Supp. 951, 957 (S.D.N.Y. 1976) (indigent imprisoned for failure to pay contempt fine released after relative loaned him money), *rev'd on other grounds sub nom.* Judice v. Vail, 403 U.S. 327 (1977).

178. Vokowich, *Debtor's Exemption Rights*, 62 GEO. L.J. 779 (1974).

179. Boylane v. Detrio, 187 F.2d 375, 377-78 (5th Cir. 1951); Walling v. Crane, 158 F.2d 80, 85 (5th Cir. 1946); V. COUNTRYMAN, CASES AND MATERIALS ON DEBTOR AND CREDITOR 83-84 (2d ed. 1974).

180. White v. Wadhams, 211 Mich. 658, 664, 179 N.W. 245, 247 (Mich. 1920); Carnahan v. Carnahan, 143 Mich. 390, 399, 107 N.W. 73, 74 (Mich. 1906); Chapel v. Hull, 60 Mich. 167, 26 N.W. 874, 876 (1886).

181. United States v. Bryan, 339 U.S. 323, 330-34 (1950).

182. Parker v. United States, 129 F.2d 374, 376 (1st Cir. 1942) (utter inability to pay the fine in whole or in part); Hendryx v. Fritzpatrick, 19 F. 810 (C.C.D. Mass. 1884) (contemnor proved he had no property and took poor-debtor's oath); Securities Investor Protection Corp. v. Executive Sec. Corp., 433 F. Supp. 470, 473 (S.D.N.Y. 1977) (no assets of any kind); Delaware, L. & W. R. Co. v. Frank, 230 F. 988, 989 (2d Cir. 1916) (dicta); Smith v. Indiana State Bd. of Health, 158 Ind. App. 445, 463, 303 N.E.2d 50, 59-60 (1973).

183. United States v. Onan, 190 F.2d 1, 9 (8th Cir. 1951).

184. United States v. Parker, 153 F.2d 66 (1st Cir. 1946); Hendryx v. Fitzpatrick, 19 F. 810 (C.C.D. Mass. 1884); *In re* Mann, 126 F. Supp. 709 (D. Mass. 1954). The Bankruptcy Act, 11 U.S.C. § 523(a)(7), effective October 1, 1979, discharges compensatory damages more clearly than the 1898 Act effective in *Parker*. The contemnor may, however, run afoul of § 523(a)(6), which excepts from discharge liabilities resulting from "willful and malicious injury."

185. 1 G. GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 74a, at 126 (1940). *See also* Potter v. Wilson, 609 P.2d 1278 (Okla. 1980) (coercive imprisonment to enforce indemnity portion of court order violates ban on debt imprisonment).

social welfare policy of protecting debtors and their families was perceived as more important than the furtherance of the substantive law and the compensation of plaintiffs. In the same manner, compensatory contempt awards advance both the underlying substantive policies and the inadequacy prerequisite. The policy of the inadequacy prerequisite is sufficiently important to support augmented compensatory contempt awards, although it may not be so significant as to overcome the policies supporting debtor protection. Automatic confinement to collect debts only short-circuits the protective devices developed over several centuries. Confining or even threatening to confine the contemnor, moreover, in order to coerce payment of money that normal judgment collection failed to recover, will often be frustrated by the contemnor's inability to pay. Imprisonment to collect money that the contemnor does not possess is merely punishment under the guise of collection. It converts reimbursement into revenge. Simply allowing the contemnor to seek release fails to ameliorate the process's injustice, indignity, and potential for abuse. Courts should subordinate the compensatory contempt policies to the humanitarian policies expressed by doctrines that protect impecunious debtors.

A compensatory contempt creditor should, however, be authorized to employ body execution or coercive imprisonment to collect compensatory contempt on the same basis as other creditors. Exceptions, if any, should flow from the type of debt or the debtor's conduct. The contempt creditor should execute, garnish, and file judgment liens. Personal orders should be utilized to satisfy contempt awards only after the impersonal devices fail. In supplementary or interrogatory proceedings to discover assets, the judge should imprison the contemnor only if convinced that he is mendacious or able but unwilling to pay. In short, courts should treat compensatory contempt awards as subject to the same exemptions, exceptions, and processes as other debts.

VI. Conclusion

In compensatory contempt proceedings, the judge must fashion a money remedy for the breach of an injunction. If, however, money was a sufficient remedy, the judge would have refused to enjoin. The judge enjoined so that the plaintiff could enjoy the substantive right unimpaired. The contemnor breached the injunction and deprived the plaintiff of the opportunity to enjoy the right. Thus, the injury the judge sought to prevent by enjoining the defendant occurred, making it too late to devise an adequate remedy. Simply granting money in compensatory contempt proceedings allows the wealthy contemnor to buy the right to continue violating the injunction. The remedial goal of constructing a world "as if" the defendant had not disobeyed the injunction is unrealistic. The judge must structure a money remedy that compensates the plaintiff, advances the underlying substantive purpose

and decision to enjoin, allocates risks, encourages private bargaining, and maintains or restores legitimacy.

Compensatory contempt is an incomplete remedy.[186] Assuming the defendant has breached the injunction and it is too late to wield coercive contempt, the judge considers criminal contempt. If the injunction is prohibitory, the defendant is callous, damages are difficult to calculate, or the plaintiff fails to show a recognized loss, then either criminal contempt or punitive damages is a desirable remedy to further the inadequacy prerequisite.[187] The same breach may lead to criminal

186. Some legally recognized injuries are not susceptible to compensation. For example, one judge enjoined the defendant from selling the plaintiff's appliances below the "fair trade" price. When the defendant breached the injunction, the plaintiff lost nothing except perhaps the ethereal "good will" of manufacturing appliances not sold at discount. The court held that sales that violated the Fair Trade Act injunction injured the manufacturer's "good will," which could be "compensated" with the seller's profits. Sunbeam Corp. v. Golden Rule Appliance Co., 252 F.2d 467 (2d Cir. 1958).

The judge could strip the contemnor of the profits earned while disobeying the order and present them to the plaintiff to destroy the contemnor's incentive to violate the injunction. This, however, partakes more of bounty than compensation. Moreover, in this particular lawsuit, the contemnor lacked records the plaintiff could adduce to prove profits. The Virginia court granted only attorney fees when the defendant breached a Fair Trade Act injunction. Arvin, Inc. v. Sony Corp. of America, 215 Va. 704, 213 S.E.2d 753 (1975). Similarly, when the contemnor disobeys an injunction against using a plaintiff's trademark or trade name but operates noncompetitively and without bringing the plaintiff into disrepute, plaintiffs have serious trouble proving damages except for attorney fees. National Drying Mach. Co. v. Ackoff, 245 F.2d 192 (3d Cir. 1957); Franklin Mint Corp. v. Franklin Mint, Ltd., 360 F. Supp. 478 (E.D. Pa. 1973).

Injuries to political, constitutional, and social interests are often small and impalpable but widespread and intolerable. Farber v. Rizzo, 363 F. Supp. 386, 398 (E.D. Pa. 1973) (when defendants violated an injunction by forbidding plaintiffs from demonstrating on Independence Mall while President Nixon signed the Revenue Sharing Act, the computation of damages was delayed pending civil action); Landman v. Royster, 354 F. Supp. 1292, 1302 (E.D. Va. 1973) (when defendants disobey an injunction to implement due process in prison discipline, the "court doubts that any injury that did occur could be quantified."); Moskovitz, *Contempt of Injunctions: Civil and Criminal*, 43 COLUM. L. REV. 780, 824 n.236 (1943); *see also* Cary v. Piphus, 435 U.S. 247 (1978).

Equity concepts developed to protect old property interests must be adopted to new property entitlements. For example, the court enjoined a class of Alabama election officials to include the NDPA, a predominately black political party, on the ballot. But the contemnor, a Greene County official, omitted the party. The court found that if the party had been on the ballot in Greene County, black candidates would have been elected to local offices. After a second election which black candidates won, the court told the contemnor to pay salaries lost by the officials who would have been elected in a proper first election. But the court said that "other claims . . . are either not applicable because said damages were not sustained by parties to this action or are too speculative. . . ." Each citizen of the seven-eighths black county suffered some impairment from the unconstitutional election and the continuation of racist rule. Hadnott v. Amos, 325 F. Supp. 777, 779 (M.D. Ala. 1971). *See also* Shakman v. Democratice Organization of Cook County, 533 F.2d 344 (7th Cir. 1976). *Compare* Bell v. Southwell, 376 F.2d 659 (5th Cir. 1967). In a non-constitutional setting, equity concepts also cause the problem of calculating impairment. *See* United States v. Auerbach, 165 F.2d 713 (2d Cir. 1948); United States v. Brotherhood of Ry. Trainmen, 95 F. Supp. 1019 (D.D.C. 1951); Brooks v. Brooks, 300 A.2d 531, 535 (Vt. 1973). *Compare* Kajtazi v. Kajtazi, 488 F. Supp. 15 (E.D.N.Y. 1978) (tort action).

187. *See, e.g.*, Sunbeam Corp. v. Golden Rule Appliance Co., 252 F.2d 467, 472 (2d Cir. 1958) (Hand, J., concurring). Christensen Eng'r Co. v. Westinghouse Air Brake Co., 135 F. 774 (2d Cir. 1905) (conpensatory contempt reversed because actual damages not proved; criminal contempt affirmed). *But see* Thomas v. Woollen, 255 Ind. 612, 617, 266 N.E.2d 20, 23 (1971) (order setting penalty for violation struck down).

and compensatory contempt,[188] or both.[189] Criminal contempt differs from compensatory contempt in both purpose and effect.[190] The line between punishing wrongdoers and compensating victims is difficult to ascertain in view of the multiple remedial policies expressed in, for example, the areas of punitive damages, multiplied damages, and damages measured by the magnitude of the wrong. The principal purpose of criminal contempt is to vindicate the public interest in obedience to orders. Its minatory features incidentally benefit the plaintiff and further private interests. Criminal and compensatory contempt are sometimes parallel, sometimes divergent, and even when combined, often leave the plaintiff with a less than perfect remedy.[191]

Compensatory contempt opinions too often belabor obvious points and miscue too many easy issues. Few states possess a developed theory of compensatory contempt, and the entire federal system has failed to generate a well-articulated theory. This impedes the routine administration of many important doctrines. Consequently, this article represents a modest effort to give form and consistency to vague, conflicting, and often disconnected statements. Stating and articulating a compensatory contempt doctrine reveals that remedial policy issues have been

188. Backo v. Local 281, 308 F. Supp. 172, 175 (N.D.N.Y. 1969).

189. *In re* Herndon, 325 F. Supp. 779 (M.D. Ala. 1971); Hadnott v. Amos, 325 Supp. 777 (M.D. Ala. 1971); *See also* Hendryx v. Fitzpatrick, 19 F. 810, 811 (C.C.D. Mass. 1884); Root v. MacDonald, 260 Mass. 344, 363, 157 N.E. 684, 691 (1927).

190. Criminal contempt reduces the plaintiff to a complaining witness. The judge retains the discretion to initiate and terminate criminal contempt. *In re* United Corp., 166 F. Supp. 343, 345-46 (D. Del. 1958); O. FISS, THE CIVIL RIGHTS INJUNCTION 18-22 (1978); Cohan & Hayes, *Contempt Proceedings: Another Dimension to Consumer Protection*, 14 SUFFOLK U.L. REV. 1, 22 (1980). The court often appoints the plaintiff's attorney to prosecute. Backo v. Local 281, 438 F.2d 176, 181 (2d Cir. 1970); Chemical Fireproofing Co. v. Bronska, 553 S.W.2d 710, 715-16 (Mo. App. 1977); *Developments in the Law: Injunctions*, 78 HARV. L. REV. 994, 1086-87 (1965); State *ex rel.* Gentry v. Becker, 174 S.W.2d 181 (Mo. 1943) (attorney appointed to prosecute criminal contempt need not be paid by government); *see also* cases cited in note 127 *infra*. Criminal contempt is a crime, and criminal procedure governs. In particular, proof of criminal contempt must be established beyond a reasonable doubt, and the state must prove that the contempt was wanton. Thus, in a combined proceeding, a judge may grant a compensatory award but exonerate the contemnor of criminal contempt. Norman Bridge Drug Co. v. Banner, 529 F.2d 822, 830 (5th Cir. 1976); Powell v. Ward, 487 F. Supp. 917, 934 (S.D.N.Y. 1980); Proudfit Loose Leaf Co. v. Kalamazoo Loose Leaf Binder Co., 230 F. 120, 132-34 (1916).

When criminal contempt is employed, the contemnor faces the risk of imprisonment, in addition to the possibility of a significant monetary fine. Prison doors possess a unique capacity to alter incentives. But criminal contempt statutes often limit contempt fines. By contrast, compensatory contempt awards may exceed a statutory fine limit. Smith v. Indiana State Bd. of Health, 158 Ind. App. 445, 467, 303 N.E.2d 50, 61 (1973). Although the government receives the criminal fine, *see, e.g.*, Hyde Constr. Co. v. Koehring Co., 387 F. Supp. 702, 715-16 (S.D. Miss. 1974), the contemnor's payment of money retains its punitive effect. Although bankruptcy will discharge some compensatory contempt judgments, the obligation to pay a criminal contempt fine is not obviated by insolvency. Parker v. United States, 153 F.2d 66 (1st Cir. 1946); Hendryx v. Fitzpatrick, 19 F. 810, 811-13 (C.C.D. Mass. 1884) (dicta); 11 U.S.C. § 523(a)(7) (Supp. II 1978); *In re* Mann, 126 F. Supp. 709 (D. Mass. 1954).

191. *See* Thompson v. Johnson, 410 F. Supp. 633, 643 (E.D. Pa. 1976). The court held that where a prisoner's privileged mail was opened, criminal contempt was not warranted, because the conduct was not wilful. In addition, no compensatory contempt was in order because mental anguish is not a proper element of compensatory damages.

neglected in compensatory contempt proceedings. Embedded in the doctrine are kernels of truth, but these truths are so concealed that courts often respond with ritual incantations of cliche. Articulating the doctrine places its deficiencies in perspective and allows a systematic consideration of the problems of effectively fashioning a consistent and fair remedy for the violation of court-ordered injunctions.